

1 **WILLKIE FARR & GALLAGHER LLP**  
2 BENEDICT Y. HUR (SBN: 224018)  
bhur@willkie.com  
3 SIMONA AGNOLUCCI (SBN: 246943)  
sagnolucci@willkie.com  
4 EDUARDO E. SANTACANA (SBN: 281668)  
esantacana@willkie.com  
5 ARGEMIRA FLÓREZ (SBN: 331153)  
aflorez@willkie.com  
6 HARRIS MATEEN (SBN: 335593)  
hmateen@willkie.com  
7 333 Bush Street, 34<sup>th</sup> Floor  
8 San Francisco, CA 94104  
Telephone: (415) 858-7400  
9  
10 Attorneys for Defendant  
GOOGLE LLC

11  
12 **UNITED STATES DISTRICT COURT**  
13 **NORTHERN DISTRICT OF CALIFORNIA**  
14 **SAN FRANCISCO DIVISION**

15  
16 ANIBAL RODRIGUEZ, *et al.* individually and on  
behalf of all others similarly situated,

17 Plaintiff,

18 vs.

19 GOOGLE LLC, *et al.*,

20 Defendant.

21 Case No. 3:20-CV-04688 RS

22 **NOTICE OF ERRATA FOR GOOGLE**  
**LLC'S MOTION FOR SUMMARY**  
**JUDGMENT (DKT. 381)**

23 **(CIVIL LOCAL RULE 79-5)**

24 Date: July 25, 2024  
Time: 1:30 p.m.  
Courtroom: 3, 17th Floor  
Judge: Hon. Richard Seeborg

Action Filed: July 14, 2020  
Trial Date: February 10, 2025

## **NOTICE OF ERRATA**

Defendant Google LLC respectfully submits this errata in order to correct inadvertent clerical errors in Google LLC’s Motion for Summary Judgment, filed on March 28, 2024 as Docket No. 381. The revisions (1) correct typographical errors to certain citations to the record or citation style errors and (2) update the Motion’s hearing date to reflect the Court’s availability.

The revised Motion is attached hereto as **Exhibit 1** and the “redline” demonstrating revisions to Docket No. 381 is attached as **Exhibit 2**.

Dated: April 4, 2024

WILLKIE FARR & GALLAGHER LLP

By: */s/ Eduardo E. Santacana*

Eduardo E. Santacana  
Benedict Y. Hur  
Simona A. Agnolucci  
Argemira Flórez  
Harris Mateen

Atorneys for Defendant  
GOOGLE LLC

# EXHIBIT 1

**WILLKIE FARR & GALLAGHER LLP**  
BENEDICT Y. HUR (SBN: 224018)  
bhur@willkie.com  
SIMONA AGNOLUCCI (SBN: 246943)  
sagnolucci@willkie.com  
EDUARDO E. SANTACANA (SBN: 281668)  
esantacana@willkie.com  
ARGEMIRA FLÓREZ (SBN: 331153)  
aflorez@willkie.com  
HARRIS MATEEN (SBN: 335593)  
hmateen@willkie.com  
333 Bush Street, 34<sup>th</sup> Floor  
San Francisco, CA 94104  
Telephone: (415) 858-7400

Attorneys for Defendant  
GOOGLE LLC

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

ANIBAL RODRIGUEZ, *et al.* individually and on behalf of all others similarly situated.

**Plaintiff.**

VS.

GOOGLE LLC, *et al.*

**Defendant:**

Case No. 3:20-CV-04688 RS

## **GOOGLE LLC'S MOTION FOR SUMMARY JUDGMENT**

Date: July 25, 2024  
Time: 1:30 p.m.  
Courtroom: 3, 17th Floor  
Judge: Hon. Richard Seeborg

Action Filed: July 14, 2020  
Trial Date: February 10, 2025

**TABLE OF CONTENTS**

I.	INTRODUCTION .....	1
II.	PROCEDURAL BACKGROUND.....	3
	A.    Plaintiffs' original Complaint and Google's Motions to Dismiss .....	3
	B.    Plaintiffs' theory of liability on the pleadings .....	4
	C.    The discovery period.....	6
	D.    The Court's Order granting Class Certification.....	6
III.	STATEMENT OF FACTS .....	7
	A.    Plaintiffs concede that Google does not personalize advertising with (s)WAA-off data; the certified theory of liability challenges basic, pseudonymous record-keeping. ....	7
	B.    Google represented that the WAA button controlled whether data would be "saved to your Google Account," <i>i.e.</i> , "associated with your personal information." .....	11
	C.    Google's disclosures uniformly and unambiguously explained that it could use non-personal information for basic record-keeping.....	12
	D.    Google never "saves to a user's Google Account," <i>i.e.</i> , personally identifies, (s)WAA-off Analytics or Ads data.....	14
	E.    Google has erected technical barriers to the joining of (s)WAA-off data with GAIA-keyed data.....	15
IV.	UNDISPUTED MATERIAL FACTS .....	16
V.	ARGUMENT .....	17
	A.    Plaintiffs consented.....	18
	B.    Plaintiffs cannot maintain their privacy torts for independent reasons.....	20
	C.    Plaintiffs cannot establish harm for any of their claims. ....	23
	D.    Plaintiffs' analysis of the CDAFA claim's "without permission" requirement focuses on the wrong permission-giver. ....	24
VI.	CONCLUSION.....	25

**TABLE OF AUTHORITIES**

	Page(s)
<b>Cases</b>	
<i>In re Accellion, Inc. Data Breach Litig.</i> , No. 5:21-CV-01155-EJD, 2024 WL 333893 (N.D. Cal. Jan. 29, 2024).....	23
<i>Byars v. Hot Topic, Inc.</i> , 656 F. Supp. 3d 1051 (C.D. Cal. 2023) .....	25
<i>Caraccioli v. Facebook, Inc.</i> , 167 F. Supp. 3d 1056 (N.D. Cal. 2016) .....	23
<i>City &amp; Cnty. of San Francisco v. Purdue Pharma L.P.</i> , No. 18-CV-07591-CRB, 2021 WL 842574 (N.D. Cal. Mar. 5, 2021) .....	21
<i>In re Facebook, Inc. Internet Tracking Litig.</i> , 956 F.3d 589 (9th Cir. 2020) .....	2, 24
<i>Graham v. Noom, Inc.</i> , 533 F. Supp. 3d 823 (N.D. Cal. 2021) .....	25
<i>Hammerling v. Google LLC</i> , 615 F. Supp. 3d 1069 (N.D. Cal. 2022) .....	23
<i>Hammerling v. Google, LLC</i> , No. 22-17024 (9th Cir. Mar. 5, 2024) (unpublished).....	20
<i>Hernandez v. Hillsides, Inc.</i> , 211 P.3d 1063, 1073 (2009).....	23
<i>Johnson v. Blue Nile, Inc.</i> , No. 20-cv-08183-LB, 2021 WL 1312771 (N.D. Cal. Apr. 8, 2021) .....	25
<i>London v. New Albertson's, Inc.</i> , No. 08-CV-1173 H(CAB), 2008 WL 4492642 (S.D. Cal. Sept. 30, 2008).....	22
<i>Low v. LinkedIn Corp.</i> , 900 F. Supp. 2d 1010 (N.D. Cal. 2012) .....	20, 22
<i>McClung v. AddShopper, Inc.</i> , No. 23-cv-01996-VC, 2024 WL 189006 (N.D. Cal. Jan. 17, 2024).....	2, 24
<i>McCoy v. Alphabet, Inc.</i> , No. 20-CV-05427-SVK, 2021 WL 405816 (N.D. Cal. Feb. 2, 2021) .....	20
<i>Moreno v. San Francisco Bay Area Rapid Transit Dist.</i> , No. 17-CV-02911-JSC, 2017 WL 6387764 (N.D. Cal. Dec. 14, 2017) .....	22

1	<i>Perkins v. LinkedIn Corp.</i> , 53 F. Supp. 3d 1190 (N.D. Cal. 2014) .....	23
2		
3	<i>Shulman v. Grp. W Prods., Inc.</i> , 18 Cal. 4th 200 (1998) .....	20
4		
5	<i>TransUnion LLC v. Ramirez</i> , 594 U.S. 413 (2021) .....	2, 24
6		
7	<i>Williams v DDR Media, LLC</i> , No. 22-cv-03789-SI, 2023 WL 5352896 (N.D. Cal. Aug. 18, 2023) .....	21
8		
9	<i>Williams v. What If Holdings, LLC</i> , No. C. 22-03780 WHA, 2022 WL 17869275 (N.D. Cal. Dec. 22, 2022) .....	25
10		
11	<i>Yale v. Clicktale, Inc.</i> , No. 20-cv-07575-LB, 2021 WL 1428400 (N.D. Cal. Apr. 15, 2021) .....	25
12		

## Statutes

12	California Comprehensive Computer Data Access and Fraud Act, Cal. Penal Code § 502 <i>et seq.</i> .....	<i>passim</i>
13		
14	California Unfair Competition Law, Bus. & Prof. Code § 17200, <i>et seq.</i> .....	3
15		
16	California Invasion of Privacy Act .....	3
17		
18	Federal Wiretap Act .....	3, 4
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1           **I. INTRODUCTION**

2           This case started with Plaintiffs' allegation that data generated when users had turned off  
 3 their Web & App Activity settings "is combined by Google into a user profile with all the other  
 4 detailed, user-specific data Google collects on individuals and their devices," which "Google then  
 5 uses [] to help generate billions of dollars in advertising revenues without users' consent." Compl.,  
 6 ECF No. 1<sup>1</sup>, at ¶¶ 37–39, 141–143, 146. None of that was true. Four years, hundreds of thousands  
 7 of pages of produced documents, and almost 200 hours of fact and expert deposition testimony later,  
 8 Plaintiffs have failed to produce a single shred of evidence substantiating that allegation. So, out of  
 9 the ashes of their original theory, Plaintiffs seek to resurrect their case with the claim that Google  
 10 should not have kept non-identifiable receipts for the ads it serves. And, the tortured theory goes,  
 11 had Google not kept those receipts, advertisers would have refused to pay for advertising, so all of  
 12 Google's advertising profit for ads served to WAA-off users should be forfeited. On that basis,  
 13 Plaintiffs seek to convert their picayune liability theory into a half-billion dollar demand for class-  
 14 wide judgment.

15           Since the allegations of Plaintiffs' current, certified theory—that Google promised not to  
 16 engage in record-keeping, that Plaintiffs had a reasonable expectation the record-keeping would not  
 17 occur, and that Plaintiffs suffered harm as a result of the record-keeping—are completely lacking in  
 18 factual basis, the Court should grant summary judgment and dismiss this case with prejudice.

19           First, Google repeatedly disclosed and secured the consent for its basic record-keeping  
 20 practices, which involve logging "non-personal information" for the purpose of reporting how ads  
 21 and mobile apps are performing.

22           Second, each Plaintiff saw these disclosures, but argues that the WAA webpage led them to  
 23 believe they could disable Google's record-keeping by switching WAA to "off." But the WAA  
 24 webpage describes the button as a way to give or withhold permission for Google to "save" app  
 25 activity data "to your Google Account" for the purpose of "personaliz[ing]" the user's experience.  
 26 There is no reasonable interpretation of this language, in isolation or in concert with the Privacy

---

27           <sup>1</sup> Google will submit a hard-copy courtesy booklet of selected docket entries that are not listed in Appendix  
 28 A (Evidentiary Material) or Appendix B (Previously Filed Under Seal Material) for the Court's ease of  
 reference.

1 Policy, that extends the ambit of the WAA control to Google's non-personal record-keeping. And  
 2 to the extent it was not immediately obvious from the WAA webpage that "to your Google Account"  
 3 limited the ambit of the control, the Privacy Policy, which each Plaintiff alleges they reviewed,  
 4 repeatedly explained that Google distinguishes between personally identifiable information and  
 5 non-personal information.<sup>2</sup> The information Google used to keep its records was non-personal  
 6 information, and Google used it in the precise ways it told Plaintiffs it would.

7 Third, Google did *not* use the information at issue to target or personalize ads, or build  
 8 marketing profiles of WAA-off users. Plaintiffs originally alleged Google did so, but they never had  
 9 a basis to make this allegation, and they abandoned that theory at class certification.

10 Finally, Google's basic record-keeping doesn't hurt anyone. Logging the fact that Google  
 11 has served an ad to a randomly generated identifier that is never linked to a Google user's identity  
 12 cannot be said to have exploited any class member's privacy, nor intruded upon their private space,  
 13 nor taken from them anything they intended to keep for themselves or sell to another.

14 Nor can Plaintiffs fall back on disgorgement of profits as a basis to establish Article III or  
 15 statutory standing, nor harm for their privacy torts. While the Ninth Circuit had, in a single sentence,  
 16 ruled that such claimants can establish Article III standing in *In re Facebook, Inc. Internet Tracking*  
 17 *Litig.*, 956 F.3d 589 (9th Cir. 2020), that is no longer good law in the wake of *TransUnion*. See  
 18 *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424–25 (2021). Nor did the Ninth Circuit purport to  
 19 rule on the question of statutory standing or the element of harm required for privacy torts.<sup>3</sup>

---

20  
 21 <sup>2</sup> See Declaration of Anibal Rodriguez in Support of Class Certification, ECF No. 315-7, at ¶ 3 (Appx. A-5)  
 22 ("When I opened my Google account in 2014, and in the years before filing this lawsuit, I had read Google's  
 23 Terms of Service, Privacy Policy, and other Google disclosures to understand what data was and was not  
 24 collected when WAA and sWAA were turned off. I agreed to those terms."); Decl. of Sal Cataldo, ECF No.  
 25 315-5, at ¶ 3 (Appx. A-3) (same); Decl. of Julian Santiago, ECF No. 315-8 (Appx. A-6) (same); Decl. of  
 26 Susan Harvey, ECF No. 315-6, at ¶ 3 (Appx. A-4) (same).

27 <sup>3</sup> See *McClung v. AddShopper, Inc.*, No. 23-cv-01996-VC, 2024 WL 189006, at \*2 (N.D. Cal. Jan. 17, 2024)  
 28 ("The Court continues to be skeptical of the plaintiffs' theory that California's statutory standing requirement  
 29 for these claims can be satisfied simply by alleging that the defendant was unjustly enriched by the  
 30 misappropriation of personal information . . ." and "[T]he Article III analysis in that section of *Facebook*  
*Internet Tracking* has been superseded by *TransUnion*, making it even more of a stretch to rely on that section  
 31 as an implicit statement about statutory standing under California law.") (citing *TransUnion*, 594 U.S. at  
 32 426–30); see also *id.* (citing *Hazel v. Prudential Financial, Inc.*, No. 22-cv-07465-CRB, 2023 WL 3933073,  
 33 at \*6 (N.D. Cal. June 9, 2023) ("Just because Plaintiffs' data is valuable in the abstract, and because [a  
 34 company] might have made money from it, does not mean that Plaintiffs have 'lost money or property' as a  
 35 result.").

1           **II. PROCEDURAL BACKGROUND**

2           **A. Plaintiffs' original Complaint and Google's Motions to Dismiss**

3           Plaintiffs filed their original complaint against Google LLC and Alphabet Inc. in July 2020,  
 4 asserting claims for violation of the Federal Wiretap Act, section 631 (wiretap) and 632  
 5 (eavesdropping) of the California Invasion of Privacy Act (“CIPA”), invasion of privacy, and  
 6 violation of the California Comprehensive Computer Data Access and Fraud Act (“CDAFA”), Cal.  
 7 Penal Code § 502 *et seq.* ECF No. 1.<sup>4</sup> Google moved to dismiss in October 2020, ECF No. 48, and  
 8 Plaintiffs amended their complaint rather than oppose, (First Am. Compl. (“FAC”)), ECF No. 60.  
 9 The FAC added several Plaintiffs, many of whom have since voluntarily withdrawn from the case.<sup>5</sup>  
 10 The FAC also asserted two more causes of action for violation of the California Unfair Competition  
 11 Law, Bus. & Prof. Code § 17200, *et seq.* and for common law intrusion upon seclusion.

12           Google moved to dismiss every claim in the FAC. ECF No. 62. This Court ruled on that  
 13 motion on May 21, 2021, granting the motion with leave to amend as to Plaintiffs' claims for  
 14 violation of the Federal Wiretap Act, section 632 of CIPA, and the Unfair Competition Law. ECF  
 15 No. 109, at 17–18. Applying Rule 9(b), the Court also dismissed Plaintiffs' theory of the case as to  
 16 purported “secret scripts” embedded in Google’s Android mobile operating system that supposedly  
 17 facilitated unlawful interceptions of communications, again with leave to amend. *Id.* at 11–12.

18           Plaintiffs’ Second Amended Complaint (“SAC”) dropped the Federal Wiretap Act and  
 19 Unfair Competition Law claims, and disavowed the “secret scripts” theory, but added a breach of  
 20 contract claim. ECF No. 113, at 68–71. Google moved to dismiss again, this time only as to  
 21 Plaintiffs’ claims for breach of contract and violation of section 631 of CIPA. ECF No. 115. This  
 22 Court granted Google’s motion as to both claims, holding that Plaintiffs failed to state a claim for  
 23 relief as to breach of contract, and that Plaintiffs’ allegations established that Google’s alleged  
 24 wrongful use of recorded communications between users and app developers took the alleged  
 25 conduct outside the ambit of CIPA section 631, since that statute requires simultaneous wiretapping

26  
 27           <sup>4</sup> All references to “ECF” are for docket entries in the above-captioned matter. Google also provides cited  
 28 ECF entries to the Court in its “Courtesy Copy of Selection of Docket Entries.”

5 The withdrawn Plaintiffs are: Eliza Cambay, Emir Goenaga, JulieAnna Muniz, Julian Santiago, Harold  
 Nyanjom, and Kellie Nyanjom.

1 for liability. ECF No. 127. In their SAC, Plaintiffs also added factual allegations concerning the  
 2 integration of Google Analytics for Firebase with AdMob and with Firebase Cloud Messaging. This  
 3 Court ruled those allegations could stand because Plaintiffs put Google on notice of their allegations  
 4 that Google Analytics for Firebase and those two products are integrated such that the latter products  
 5 use data collected by the former. *Id.* at 3, 7–8.

6 Plaintiffs filed their Third Amended Complaint (“TAC”) on September 1, 2021, re-asserting  
 7 their breach of contract and CIPA section 631 claims. ECF No. 131 (unredacted at ECF No. 130).  
 8 Google moved to dismiss those claims again, ECF No. 139, and the Court dismissed them with  
 9 prejudice. ECF No. 209. Google answered the TAC on February 22, 2022. ECF No. 230.

10 Finally, in late 2022, two days before discovery closed, Plaintiffs sought to amend their  
 11 complaint again to add Google Search as an accused product in the case. ECF No. 258. This Court  
 12 denied that motion for leave to amend while permitting an unopposed amendment to the extant class  
 13 definitions. ECF No. 281. The operative Fourth Amended Complaint (“4AC”) was filed on January  
 14 4, 2023. ECF No. 289.

#### 15 **B. Plaintiffs’ theory of liability on the pleadings**

16 Through successive orders on Google’s motions to dismiss, this Court narrowed Plaintiffs’  
 17 case to a simple and straightforward claim. As described by the Court in its first Order on Google’s  
 18 Motion to Dismiss the FAC, Plaintiffs allege that Google Analytics (“GA”) for Firebase, a tool  
 19 Google provides to app developers for use on mobile devices, “when functioning as advertised in a  
 20 given app, contravenes [Google’s] user-facing privacy representations.” ECF No. 109, at 1. If, as  
 21 Plaintiffs allege, GA for Firebase (“GA4F”) does contravene Google’s user-facing privacy  
 22 representations, this Court ruled, Plaintiffs would have claims against Google for violation of the  
 23 CDAFA and the common law torts of intrusion upon seclusion and invasion of privacy. *Id.* at 14–  
 24 16.

25 In particular, Google makes available to users “a complex user-facing privacy apparatus” for  
 26 controlling various privacy-related aspects of the user experience. *Id.* at 2–4. One such tool is an  
 27 account setting (among others) called “Web & App Activity,” or WAA. The WAA button<sup>6</sup> “purports

---

28 <sup>6</sup> Following the Court’s May 2021 Order Granting in Part Google’s Motion to Dismiss, Plaintiffs amended  
 GOOGLE LLC’S MOTION FOR SUMMARY JUDGMENT

1 to give consumers control over a defined subset of Google’s data-gathering efforts.” *Id.* at 3.  
 2 Specifically, it tells users that if they turn on the toggle, that will “let Google save” certain  
 3 information to “an individual’s ‘Google Account.’” *Id.* at 3. That set of data comprises “‘info about  
 4 [the individual’s] searches and other activity on Google sites, apps, and services,’ as well as ‘info  
 5 about [the individual’s] . . . activity on sites, apps, and devices that use Google services.’” *Id.* The  
 6 Court found particularly relevant in these disclosures two undefined terms—“Google services” and  
 7 “Google Account.” Depending on how a user interprets those terms, this Court held, a reasonable  
 8 user could potentially be misled by the description of the WAA button in light of how GA4F works.  
 9 *Id.* at 8–10.

10 GA4F is an enterprise-facing product that app developers can use for free. *Id.* at 4. When  
 11 functioning as advertised, “GA for Firebase will automatically send various interactions between  
 12 the app and its users . . . to Google, which will then present a clean, optimization-minded analysis  
 13 of that data to the developer.” *Id.* at 4. To use GA4F, app developers must agree to obtain consent  
 14 for end users for the developer’s use of GA4F. *Id.* at 4–5 & n. 3 (discussing “GA for Firebase  
 15 Materials,” a “suite of agreements, policies, and resources” provided to developers in Google’s  
 16 publicly-available online “Help Center”). As described by the Court, Plaintiffs allege that GA4F  
 17 contravenes the WAA description as follows:

18 Plaintiffs allege Google’s capture and analysis of data via GA for Firebase, on  
 19 behalf of app developers who knowingly utilize that service, violates the WAA  
 20 Materials’ representations to individuals who have disabled the WAA feature.  
 21 Under this theory of liability, GA for Firebase—when running as marketed—  
 22 allows Google to collect information about an individual’s “activity on . . . apps . . . that use Google services,” notwithstanding the WAA Materials’ statement that  
 “[t]o let Google save this information . . . Web & App Activity *must* be on.”

23 *Id.* at 6 (emphasis in original). Further, this Court ruled that the phrase “Google Account” was  
 24 sufficiently ambiguous that a user could reasonably believe that turning WAA off would prevent

---

25  
 26 their complaint to include descriptions of the supplemental Web & App Activity (“(s)WAA”) button. See  
 27 4AC, ECF No. 289. The (s)WAA button provides users with the option to allow Google to save “Chrome  
 28 history and activity from sites, apps, and devices that use Google services” to the user’s Google Account. *Id.*  
 at 22. WAA must be on for (s)WAA to be on. *Id.* Thus, when a user disables the WAA toggle, the (s)WAA  
 button is also disabled. *Id.* In this case, the parties refer to the two controls collectively as “WAA” or  
 “(s)WAA”.

1 Google from saving GA4F data linked to that user’s “e-mail address,” or that “monitors” that user’s  
 2 activity across the web, or that personalizes that user’s experiences across Google services. *Id.* at 8–  
 3 9. As a result, Plaintiffs stated a claim for violation of the CDAFA because Google’s data collection  
 4 was allegedly “without permission,” and for invasion of privacy because the question of whether  
 5 the user consented and whether the collection was highly offensive were inappropriate for resolution  
 6 on the pleadings. *Id.* at 14–16. Those are the claims that have survived through later motions to  
 7 dismiss. As of today, four named Plaintiffs remain: Sal Cataldo, Susan Lynn Harvey, Anibal  
 8 Rodriguez, and Julian Santiago. *See* 4AC, ECF No. 289.

### 9       **C. The discovery period**

10       In total, the parties engaged in 48 months of fact discovery and 5 months of expert discovery,  
 11 comprising 211,186 pages of produced documents, 1,113 pages of expert reports, 2,201 pages of  
 12 expert depositions, and 4,239 pages of witness deposition transcripts. Santacana Decl. ¶ 3. When  
 13 necessary, the parties appealed to Judge Tse to resolve discovery disputes. In all, Judge Tse issued  
 14 21 Orders resolving 25 discovery disputes. Santacana Decl. ¶ 3. At the close of fact discovery,  
 15 Plaintiffs requested a two-month extension of the discovery period on the grounds that Google had  
 16 engaged in alleged discovery misconduct. ECF No. 279. This Court denied that motion in December  
 17 2022. ECF No. 282.

### 18       **D. The Court’s Order granting Class Certification**

19       Following expert discovery, Plaintiffs moved for class certification, ECF No. 315, and  
 20 Google opposed, ECF No. 329. The Court issued its Order granting class certification on January  
 21 3, 2024, ECF No. 352, certifying two classes of plaintiffs comprising individuals who turned off  
 22 (s)WAA and used Firebase – or Google Mobile Ads – enabled apps.

23       In order to secure class certification, Plaintiffs disclaimed a variety of arguments and pressed  
 24 to the Court the theory that the mere collection of app activity data, absent any use by Google, and  
 25 even if it is made pseudonymous or anonymous, nevertheless contravened Google’s description of  
 26 the WAA button, and that the difference could be used to hold Google liable class-wide.

27       Accepting Plaintiffs’ arguments, the Court granted class certification and rejected Google’s  
 28 arguments concerning individualized issues. *Id.* In particular, the Court reasoned that Google’s

1 consent defense could be decided class-wide because “Google’s representations about the WAA  
 2 feature, unambiguous and persistent by its own admission, outweigh these individual questions  
 3 about *where* class members learned about the WAA feature.” *Id.* at 15–16 (emphasis in original).  
 4 Further, the Court held that “the relevant ‘conduct’ showing a lack of consent is the users’ decisions  
 5 affirmatively to switch off the WAA and sWAA buttons,” which this Court held constituted a  
 6 “common act representing their privacy choices, based on Google’s own ubiquitous  
 7 representations.” *Id.* at 9–10. In addition, the Court held that “even if Google is right, and the ‘vast  
 8 majority’ of class members’ data was only exposed to record-keeping ‘not tied to a person’s identity  
 9 or used by Google for any purpose other than to perform accounting for the apps that generated the  
 10 data or advertising in the first place,’ Opp. at 16, then surely that can be proven by common evidence  
 11 of Google’s record-keeping practices.” *Id.* at 12.

### 12 III. STATEMENT OF FACTS

13 The following statement of facts is undisputed. To the extent Plaintiffs dispute any fact  
 14 below, Google respectfully submits that no evidence in the record supports such a position.

#### 15 A. Plaintiffs concede that Google does not personalize advertising with (s)WAA- 16 off data; the certified theory of liability challenges basic, pseudonymous record-keeping.

17 GA4F is “an app measurement solution” used by mobile app developers for “insight on app  
 18 usage and user engagement.” *See Google Analytics*, Firebase, ECF No. 324-1(Appx. A-8).<sup>7</sup> Using  
 19 GA4F, app developers can measure various “events,” or specific types of user interactions with their  
 20 apps.<sup>8</sup> *See* Expert Report of Jonathan Hochman (“Hochman Rpt.”) ECF No. 361-58, ¶¶ 89–91  
 21 (Appx. A-11); Interrog. Set One Resp., ECF No. 364-1, at 4:20–5:6 (Appx. A-13). As a service  
 22 provider, Google accepts bundles of event data from app developers’ apps and stores and analyzes  
 23 them for those developers regardless of a user’s (s)WAA setting. ECF No. 364-1, at 10:15–11:5,  
 24 28:4–28:23 (Appx. A-13).

---

25  
 26 <sup>7</sup> *See also* Interrog. Set One Resp., ECF No. 364-1, at 5:8–21; “App Attribution in GAA,” ECF No. 364-2,  
 27 at -515 (Appx. A-14) (Unsealed Version at Appx B-4); Hochman Rpt., ECF No. 361-58, at ¶ 62 (Appx. A-  
 11).

28 <sup>8</sup> Default events include, for example, the first opening of an app, or when a user clicks on a certain part of  
 the app. ECF No. 361-58, ¶ 94 & n. 84; Interrog. Set One Resp., ECF No. 364-1, at 4:20–5:21 (Appx. A-  
 13); *see also* ECF No. 324-4 (excerpting “[GA4] Automatically collected events”) (Appx. A-9).

1           As long as they comply with Google’s terms of use, app developers can also customize their  
 2 usage of GA4F. *See* Historic GA4F Terms of Service (Appx. A-2); ECF No. 65, at 5–6 (Appx. A-  
 3 1).<sup>9</sup> Per Google’s terms, apps must disclose and obtain consent from end users to use the SDK. *Id.*

4           In their complaints, Plaintiffs alleged that Google saves WAA-off data to marketing profiles  
 5 and uses them to personalize advertising, that Google “includes in its user profiles” data “secretly  
 6 transmitted to Google” by “tracking and advertising code,” *i.e.* GA4F. And they claimed that by  
 7 “including this data in its user profiles, Google increases the user profiles’ value” and “allows  
 8 Google to more effectively target advertisements to these users”; and that “this [sWAA-off] data is  
 9 combined by Google into a user profile with all the other detailed, user-specific data Google collects  
 10 on individuals and their devices,” which “Google then uses [] to help generate billions of dollars in  
 11 advertising revenues without users’ consent.” ECF No. 1, ¶¶ 37–39, 141–143, 146.

12           Over the course of this lawsuit, Plaintiffs’ narrative shifted; they and their experts now  
 13 concede these allegations were false.<sup>10</sup> Indeed, Google’s verified interrogatory response, served  
 14 nearly three years ago, made it clear: **Google does not save WAA-off data to any Google user’s  
 15 marketing profile, and does not use WAA-off data for personalized advertising, either in  
 16 connection with a user’s true identity or in connection with a user’s pseudonymous identity.**<sup>11</sup>  
 17 Interrog. Set One Resp., ECF No. 364-1, at 7:7–14 (Appx. A-13). Plaintiffs no longer contend, as  
 18 they once did, that Google secretly collects (s)WAA-off data to create profiles for personalized  
 19 advertising. Instead, Plaintiffs argue that Google uses (s)WAA-off data for basic record-keeping.  
 20 And, in their Motion for Class Certification, Plaintiffs paradoxically argued that Google conceals  
 21 its basic record-keeping with (s)WAA-off data “by turning off ‘personalized’ ads that could tip  
 22 [users] off to Google’s continued tracking.” Class Cert. Mot., ECF No. 361-1, at 2. That is, for most  
 23

24           <sup>9</sup> *See also* Additional Historic GA4F Terms of Service, (Appx A-2).

25           <sup>10</sup> *See* Dep. Tr. of Jonathan Hochman (“Hochman Tr.”), ECF No. 364-19, at 194:18–24 (Appx. A-20) (Q. “[Y]ou’re not disputing in this case that Google will not personalize ads . . . with sWAA-off Google analytics for Firebase data?” A. “That’s correct.”). *See also* Dep. Transcript of Michael Lasinski (“Lasinski Tr.”), ECF No. 364-17, at 79:16–18 (Appx. A-19) (“[M]y understanding is that Google has represented that sWAA-off users do not receive personalized ads.”); *id.* at 81:6–9 (Q. “So for neither scenario did you assume that sWAA-off users were receiving personalized ads that relied on sWAA-off data?” A. “Correct.”).

26           <sup>11</sup> *See also* Google’s Resp. to Plaintiffs’ Interrog., Set Six, ECF No. 364-22, at 8:21–10:9 (Appx. A-22);  
 27 Interrog. Set One Resp., ECF No. 364-1, at 23:15–25:23 (Appx. A-13); Interrog. No. 18 Resp., ECF No. 364-8, at 5–6; Dep. Tr. of Belinda Langner (“Langner Tr.”), ECF No. 364-7, at 78:2–7 (Appx. A-18).

1 of the pendency of this case, Plaintiffs maintained that Google's alleged personalization of  
 2 advertising with (s)WAA-off data was deceptive; now they argue that Google's decision not to  
 3 personalize advertising with (s)WAA-off data is deceptive.

4 Specifically, the Motion argued that Google contravenes its representations because, even  
 5 when a user's (s)WAA is turned off, Google will still (1) log the fact that it has served an ad  
 6 alongside a device identifier for accounting purposes, and (2) attribute conversion events to those  
 7 ad serving records. *See* ECF No. 361-1, at 14. Plaintiffs' damages theory relied upon to obtain class  
 8 certification focuses on this use of (s)WAA-off data, positing that (1) “[i]f Google did not collect  
 9 and save ad requests, it could not serve ads. And without data regarding both ad requests and the  
 10 ads that Google served, Google would lack the records it needs to charge advertisers for its services”  
 11 and (2) “Google also uses this ads data to track conversions; if it lacked data regarding a user’s  
 12 interaction with an ad, it would be unable to determine whether that interaction is related to any  
 13 later behavior.” Hochman Rpt., ECF No. 361-58, ¶ 122 (Appx. A-11).<sup>12</sup> The logging of the  
 14 (s)WAA-off record of ad service or analytics conversion events is, in Plaintiffs’ view, an  
 15 indispensable link in a long chain that ends in advertisers paying for advertising.<sup>13</sup> Thus, Plaintiffs  
 16 claim, Google should be disgorged of *all* profit made from serving any ads to (s)WAA-off users on  
 17 mobile apps, because to perform the serving of the ad, Google had to exchange information with  
 18 the mobile app where the ad was served, and keep a record that it served it. *Id.* at ¶ 271; Lasinski  
 19 Tr., ECF No. 364-17, at 129:12–18 (Appx. A-19).

20 At a technical level, the practice Plaintiffs complain of as profit-making is the use of  
 21  
 22

---

23 <sup>12</sup> *See id.* ¶ 271 (“[B]ut for Google’s collection of WAA-off or sWAA-off data, Google would not be able to  
 24 serve advertisements to those users and then charge the advertisers because Google would lack the necessary  
 25 data records to back up their advertising charges.”); Lasinski Tr., ECF No. 364–17, 113:1–3, 113:20–23  
 26 (Appx. A-19) (“The advertiser would pay less to Google because Google did not – would not serve an ad in  
 27 those cases. . . [T]hey would pay them less because those ads that are currently being shown to sWAA-off  
 28 users would not be shown to sWAA-off users.”); *id.* at 137:8–14 (“My understanding is, based on input given  
 to me, is that Google would not be able to serve an ad in those situations. Whether or not you want to call it  
 an ad blocker, I’ve never called it that, but Google would not be able to serve an ad in those situations.”).

<sup>13</sup> Plaintiffs have also complained that Google uses the (s)WAA-off data to improve Google’s products and  
 services (Class Cert. Mot., ECF No. 361-1, at 3), and engage in fraud and spam detection (Hochman Tr.,  
 ECF No. 364-19, at 204:25–209:10 (Appx. A-20)), but they do not assign these uses any value in their  
 damages models and do not rely on these arguments to demonstrate class-wide injury.

(s)WAA-off records by Google to perform “attribution”<sup>14</sup> for advertisers. *See* Hochman Rpt., ECF No. 361-58, ¶¶ 279–296 (describing generally “Attribution/Conversion Tracking”); Appendix E to Hochman Report: Ad Campaigns and Conversion Tracking/Modeling (Appx. A-11); ECF No. 361-59, ¶¶ 12–26 (Appx. A-12) (Unredacted at Appx. B-1). Attribution can be performed in a number of ways. The specific technique Plaintiffs complain of works as follows:

1. **At Time 1**, an ad for the New York Times (NYT) app appears in the Nike app, which uses the Google Mobile Ads SDK (AdMob) to serve ads. An unidentified user clicks on it, causing the SDK to **log that the user’s device ID clicked on that ad**.
2. Then, the user installs and opens the advertised NYT app. The NYT app uses the Firebase SDK and GA4F. As a result, **at Time 2**, the NYT app uses GA4F to **log that the user’s device ID triggered the “first\_open” analytics event**.
3. Google’s ad system connects the dots on the back end: the same device ID that clicked on the ad at Time 1 triggered the “first\_open” event at Time 2. If the two times are within a time period set by the advertiser (for example, 7 days), Google reports to the app developer/advertiser that **a conversion has occurred**. Over time, the app developer/advertiser receives aggregate reporting on the conversions they’ve achieved.

Measuring conversions varies from app to app because app developers can choose to rely on Google’s default conversion events, like “first\_open,” or they can create their own custom conversion events.<sup>15</sup> Hochman Rpt., ECF No. 361-58 at ¶ 94 & n.84 (Appx A-11); *see also* “Log Events,” Google Analytics (Appx. A-23). Plaintiffs have never offered any explanation for how this basic record-keeping activity harms users.

The conversion and ads logs in question are streamlined to contain just the critical pieces of information—which device triggered the event, the name of the event, which app sent Google the information, and other similar pieces of information. *See* Expert Report of John Black (“Black Rpt.”), ECF No. 364-20, ¶ 92 (Appx. A-21); *see also* Hochman Rpt, App’x E, ECF No. 361-59 (Appx. A-12). So, for example, while a conversion event could be called “in\_app\_purchase,” and it could contain for the app developer pseudonymous information about what the device purchased, for Google’s attribution purposes, it is just the fact that the event occurred that is logged and later

---

<sup>14</sup> *See generally* “Attribution (Marketing),” Wikipedia, The Free Encyclopedia (last modified February 10, 2024), [https://en.wikipedia.org/wiki/Attribution\\_\(marketing\)](https://en.wikipedia.org/wiki/Attribution_(marketing)).

<sup>15</sup> *See generally* “[GA4] Create or Modify Conversion Events,” Google Analytics Help, accessed March 21, 2024, <https://support.google.com/analytics/answer/12844695?hl=en>

1 used to connect an ad click at Time 1 with a purchase at Time 2. *See* Black Rpt., ECF No. 364-20,  
 2 ¶ 92 (Appx. A-21); *see also* Hochman Rpt., ECF No. 361-58, ¶¶ 122–123.

3 This accounting function is the basis for the certified theory of liability.

4 **B. Google represented that the WAA button controlled whether data would be “saved to  
 5 your Google Account,” i.e., “associated with your personal information.”**

6 The theory of liability certified by this Court centers around Google’s representation that  
 7 turning WAA<sup>16</sup> on would enable Google to “save” a user’s activity data “in your Google Account.”  
 8 4AC, ECF No. 289, at 27. Plaintiffs reason that the opposite should hold true as well; that is, if a  
 9 user turns off WAA, that should disable Google from saving a user’s activity data to that user’s  
 10 Google Account. As discussed below, that is exactly how WAA works.

11 Part of Plaintiffs’ theory of liability rests on the term “**your Google Account**.” This is a  
 12 defined term. *See* Privacy Policies, ECF No. 323-1, at 52 (Appx. A-7). The Privacy Policy (“PP”)  
 13 has, since the start of the class period, explained that Google treats information “associated with  
 14 your Google Account” as “personal information,” which is distinct from “non-personally  
 15 identifiable information.” Privacy Policies, ECF No. 323-1, at 5, 52 (Appx. A-7). First, the PP  
 16 explained that “Information we collect when you are signed in to Google, in addition to information  
 17 we obtain about you from partners, may be associated with your Google Account. **When  
 18 information is associated with your Google Account, we treat it as personal information.** For  
 19 more information about how you can access, manage or delete information that is associated with  
 20 your Google Account, visit the Transparency and choice section of this policy.” *Id.* at 5; *see also id.*  
 21 at 6–7, 11 (“Depending on your account settings, your activity on other sites and apps may be  
 22 **associated with your personal information**” and Google “may share non-personally identifiable  
 23 information publicly and with our partners”).

24 Throughout the class period, the PP directed users to a “Key Terms” section if there were  
 25 phrases they did not understand: “We’ve tried to keep it as simple as possible, but if you’re not  
 26  
 27

---

28<sup>16</sup> The (s)WAA control can only be enabled if WAA is also enabled.

familiar with terms like cookies, IP addresses, pixel tags and browsers, then read about these key terms first.” *Id.* at 1. The Key Terms section in turn defined throughout the class period the phrases “Google Account,” “personal information,” and “non-personally identifiable information.” *Id.* at 52. “**Google Account**” was defined as the Account a user signs up for by “providing us with some personal information” which can be used “to authenticate you when you access Google services; “**personal information**” was defined as information “which personally identifies you, such as your name, email address or billing information, or other data which can be reasonably linked to such information by Google, **such as information we associate with your Google account**”; and “**non-personally identifiable information**” was defined as “information that is recorded about users so that it no longer reflects or references an individually identifiable user.” *Id.* No section of the PP or the WAA page itself suggests to users that there is an account control to disable Google’s collection or use of “non-personally identifiable information.”<sup>17</sup>

**C. Google’s disclosures uniformly and unambiguously explained that it could use non-personal information for basic record-keeping.**

Google discloses its uses of analytics and ads data in many contexts, and explains the difference between run-of-the-mill record-keeping using non-personal information and personalized advertising using personal information associated with a Google Account.

First, in its Privacy Policy, Google explained throughout the class period that Google uses “cookies or similar technologies to identify your browser or device” and to “collect and store information when you interact with services we offer to our partners, such as advertising services or Google features that may appear on other sites,” including “Google Analytics.” ECF No. 323-1, at 4–5 (Appx. A-7). Further, the PP explained that analytics helps app owners “analyze the traffic to their [] apps” and “[w]hen used in conjunction with our advertising services . . . Google Analytics

---

<sup>17</sup> Further, since at least 2016, in a section linked from the PP called “How Google uses data when you use our partners’ sites or apps,” Google explained that “apps that partner with Google can send us information such as the name of the app and an identifier that helps us to determine which ads we’ve served to other apps on your device. If you are signed in to your Google Account, and depending on your Account settings, we may add that information to your Account, and treat it as personal information.” ECF No. 323-1, at 54 (excerpting “How Google uses data when you use our partners’ sites or apps” from Google’s Privacy & Terms dated June 28, 2016 PP) (Appx. A-7). The account setting referenced here is, once again, the WAA setting.

1 information is linked, by the Google Analytics customer or by Google, using Google technology,  
 2 with information about visits to multiple sites.” *Id.* at 5.

3 The PP also explained that “we [Google] regularly **report to advertisers on whether we**  
 4 **served their ad to a page and whether that ad was likely to be seen.**” *Id.* at 23. Google’s Privacy  
 5 Portal also hosts a “How Ads Work” page, which again explained: “We give advertisers data about  
 6 their ads’ performance, but we do so without revealing any of your personal information.” *Id.* at 29.  
 7 Starting in March 2018, Google maintained a PP “Technologies” page, a corollary to the earlier  
 8 “How Ads Work” page; that page again explained: “We store a record of the ads we serve in our  
 9 logs”; “We anonymize this log data by removing part of the IP address (after 9 months) and cookie  
 10 information (after 18 months)”; and “You can use Ads Settings to manage the Google ads you see  
 11 and opt out of Ads Personalization,” but “[e]ven if you opt out of Ads Personalization, you may  
 12 still see ads based on factors such as your general location derived from your IP address, your  
 13 browser type, and your search terms.” *Id.* at 49.

14 Indeed, Plaintiff Sal Cataldo understood that (s)WAA was not an ad blocker and that while  
 15 he could control ads personalization, he could not use (s)WAA or the ads personalization button to  
 16 prevent Google from serving ads at all. Dep. Transcript of Sal Cataldo (“Cataldo Tr.”), ECF No.  
 17 364–6, at 152:18–153:18 (Appx. A-17).

18 Plaintiffs have argued that the (s)WAA control should function as an ad blocker, and prevent  
 19 Google even from keeping basic record-keeping of the ads it serves on behalf of third party  
 20 advertisers. But there is no textual basis for this argument.

21 Throughout the class period, the PP explained that users can “[r]eview and update your  
 22 Google activity controls to decide what types of data, such as videos you’ve watched on YouTube  
 23 or past searches, you would like **saved with your account** when you use Google services.” ECF  
 24 No. 323-1, at 7 (Appx. A-7). The text of the WAA control explains: “The data **saved in your account**  
 25 helps give you more **personalized** experiences across all Google services. Choose which settings  
 26 will save data **in your Google Account.**” 4AC, ECF No. 289, at 27 (emphasis added).

27 Google repeatedly explained to users that they could affect the advertising Google serves to  
 28 them via the “Ad Settings” button, **not** the WAA toggle. The PP and related disclosures made clear

1 that turning off the personalization setting would not prevent Google from serving ads, only make  
 2 the ads less relevant. ECF No. 323-1, at 48–50 (Appx. A-7). In other words, Google disclosed that  
 3 it would still perform its role as record-keeper for advertisers, and it would still serve ads, regardless  
 4 of a user’s Google Account Ad or WAA settings (and never represented that activity controls like  
 5 WAA would have anything to do to the contrary).

6 **D. Google never “saves to a user’s Google Account,” i.e., personally identifies, (s)WAA-off**  
**Analytics or Ads data.**

7       The WAA button says it can be used to give Google permission to save activity data to a  
 8 user’s Google Account. The button does exactly what it says it will do. When WAA is off, Google  
 9 **never** saves activity data to a user’s Google account. *See* Interrog. Set One Resp., ECF No. 364-1,  
 10 at 11:19–13:17 (Appx. A-13); Interrog. Set Seven Resp., ECF No. 364-8, at 6:16–7:26; Hochman  
 11 Rpt., ECF No. 361-58, at ¶ 205 & n.136 (Appx. A-11); Langner Tr., ECF No. 364-7, at 78:2–78:7  
 12 (Appx. A-18).

13       If the user’s (s)WAA toggle—the toggle that applies to data from third-party apps—is set to  
 14 “off,” these data are **never** used by Google to identify users; they are processed and analyzed for the  
 15 benefit of the app developer who generated the data, so they can better understand their own  
 16 interactions with their own users and the success of their own advertising. Interrog. No. 1  
 17 Resp., ECF No. 364-1, at 16:19–17:5, 28:4–29:7 (Appx. A-13). Further, (s)WAA-off data is treated  
 18 by Google strictly as pseudonymous data. *Id.*; *see* Dep. Transcript of Steve Ganem (“Ganem Tr.”)  
 19 ECF No. 364-3, at 44:16–19 (Appx. A-15). Google logs analytics and ads data alongside a randomly  
 20 generated pseudonymous identifier (a device ID like ADID or IDFA on iOS) that is never mapped  
 21 to the identity of the Google Account that was using the device. Interrog. No. 1 Resp., ECF No.  
 22 364-1, at 12:7–13:2 (Appx. A-13). Google never unmasks pseudonymous identifiers, and takes steps  
 23 to ensure these pseudonyms are never re-unified to a user’s identity. *Id.* at 8:2–9, 13:3–14:2, 23:15–  
 24 25:23, 26:11–28:2; App’x X4 to Black Rpt., (sampling Google’s “Anti-Fingerprinting” and User  
 25 Data Access Policies) (Appx. A-16). The only circumstance in which Google saves *any* activity data  
 26 to a user’s Google account is when Google has first ensured the user has provided all required  
 27 consents, including that (s)WAA is set to “on.” Interrog. No. 1 Resp., ECF No. 364-1, at 23:15–

1 26:9 (Appx. A-13)

2 Plaintiffs do not contest any of this; indeed, when asked about this practice, Plaintiffs’  
 3 technical expert conceded that Google “has the best intentions here” to keep pseudonymous and  
 4 identifiable data separate, but complains that “maybe Google is nice today but they become evil in  
 5 the future” and decides to re-unify data for a government or for profit.<sup>18</sup> Hochman Tr., ECF No.  
 6 364-19, at 364:18–365:5 (Appx. A-20).

7 **E. Google has erected technical barriers to the joining of (s)WAA-off data with GAIA-  
 8 keyed data.**

9 Google takes significant steps to ensure that (s)WAA-off data are not re-associated with the  
 10 user whose device generated the data. These steps vary from simple isolation of access to critical  
 11 pieces of information to advanced cryptographic techniques that makes it a practical impossibility  
 12 for anyone at Google or anyone else to be able to rejoin pseudonymous data to a user’s identity.

13 First, when Google’s servers perform a consent check to determine a user’s (s)WAA setting,  
 14 the device IDs are encrypted, and the server checking the user’s consent status does not also receive  
 15 the analytics data. *See Interrog. No. 1 Resp.*, ECF No. 364-1, at 23:15–25:6, 26:11–28:2 (Appx. A-  
 16 13). As a result, the physical machine that receives the encrypted device ID from user devices isn’t  
 17 able to decrypt it, and the physical machine that decrypts the device ID doesn’t receive the  
 18 measurement data. *Id.*

19 When a consent check returns a (s)WAA-off result, analytics data are logged to  
 20 “pseudonymous space.” *Id.* at 23:27–24:7, 25:7–8. These logs do not contain identifying  
 21 information in them. For example, they do not contain GAIA IDs, which correspond to a user’s  
 22 Google Account identifier. *Id.* at 25:25–26:9. Likewise, GAIA-keyed logs in “GAIA space” at  
 23 Google do not contain the identifiers in pseudonymous logs, such as device ID or unencrypted  
 24 app\_instance\_id. *Id.* Further, for those pieces of information that overlap between the GAIA log and  
 25 the pseudonymous log, they are encrypted differently and the decryption keys are thrown away after

---

26  
 27 <sup>18</sup> Even if there is a potential for rare instances of violation of Google’s terms of service by app developers,  
 28 that is *not* the basis of any certified theory of liability in this case, as any such idiosyncrasy could not be said  
 to be uniform across the class, nor could Google be held liable for it, since causation would in that case  
 depend on a third party’s conduct.

1 six days, making it impossible to match up fields in one log to the other. *Id.* at 27:8–21.

2 Google limits access to these decryption keys to select individuals, and if any unauthorized  
 3 individual seeks access to them, Google has systems in place that will prevent them from obtaining  
 4 access. *See Interrog. Set One Resp.*, ECF No. 364-1, at 27:15–28:2 (Appx. A-13); *see also* Black  
 5 Rpt., ECF No. 364-20, at ¶¶ 171, 178 (Appx. A-21). Google also “salts” data in GAIA logs, meaning  
 6 random data is added to it, to make it even harder to match it up to overlapping data sets in  
 7 pseudonymous logs. ECF No. 364-1, at 26:7–9 (Appx. A-13).

9 Finally and most importantly, Google employees are flatly forbidden from performing a  
 10 “join” of data that would unmask the identity of an individual whose data was logged in  
 11 pseudonymous space. *Id.* at 24:9–15, 27:22–28:2.<sup>19</sup> Many of these controls have been in place since  
 12 Google launched GA4F; others have been adopted over time. Google’s prohibition on  
 13 circumventing these privacy controls, however, have been in place at least since GA4F launched.  
 14 *See App’x X4 to Black Rpt.* (compiling “Anti-Fingerprinting” Policies as far back as January 21,  
 15 2015) (Appx. A-16).

#### 16 IV. UNDISPUTED MATERIAL FACTS

17 In light of the foregoing statement of facts, and for the ease and convenience of the Court,  
 18 Google submits that the following undisputed material facts resolve this dispute in its entirety,  
 19 understanding the Court may also find other undisputed facts described above material as well.

20 1. At all relevant times, Google represented that the WAA button controlled  
 21 whether certain data would be “saved to your Google Account.”

22 2. At all relevant times, the phrase “saved to your Google Account” limited the  
 23 ambit of the WAA button to permissions relating to saving data in a manner that was  
 24 associated with personal information.

25 3. At all relevant times, Google represented through its Privacy Policy and  
 26 Privacy Portal that the phrase “saved to your Google Account” meant “associated with your  
 27 personal information,” not “saved” in any form, for any purpose, even if made  
 28 pseudonymous.

---

27 <sup>19</sup> *See also App’x X4 to Black Rpt.*, ECF No. 364-4 (Appx A-16) (compiling Google’s “Anti-Fingerprinting”  
 28 Policies); “GEO Privacy Champion”, ECF No. 361-13, at - 411 (Appx. A-10); ECF No. 314-7, (Unsealed  
 Version, Appx B at B-2); Ganem Tr., at 44:1-44:19, (Appx. A-15); Hochman Tr., ECF No. 364-19, at  
 135:25–136:1 (Appx. A-20) (“Yeah, I don’t think I necessarily found an indication of joining.”).

1       4. At all relevant times, Google’s Privacy Policy defined “personal information”  
 2 to mean information “which personally identifies you, such as your name, email address or  
 3 billing information, or other data which can be reasonably linked to such information by  
 4 Google, such as information we associate with your Google account,” or a substantially  
 5 similar definition.

6       5. Google did not save the WAA-off or (s)WAA-off data at issue in this case  
 7 generated by class members to that class member’s Google Account.

8       6. Google did not associate the WAA-off or (s)WAA-off data at issue in this case  
 9 generated by class members with the class members’ personal information.

10      7. Google maintained the WAA-off or (s)WAA-off data at issue in this case  
 11 generated by class members in pseudonymous or anonymous form in a manner that disabled  
 12 Google employees from personally identifying the user that generated the data.

13      8. Google never used the WAA-off or (s)WAA-off data at issue in this case  
 14 generated by class members to personalize advertising to class members or build marketing  
 15 profiles.

## 16      V. ARGUMENT

17      Plaintiffs’ case hinges on the factual claim that Google saved app activity data gathered by  
 18 GA4F to Plaintiffs’ Google Accounts while (s)WAA was switched off. Because Google represented  
 19 that it would save such data to a user’s Google Account only when they had turned WAA on,  
 20 Plaintiffs argue, Google violated its promises to users and thereby their privacy rights. That same  
 21 theory underlies the Court’s decision to permit some of Plaintiffs’ claims to proceed past the  
 22 pleadings stage. ECF No. 109, at 3–4, 6. Per the Court, “[u]nder this theory of liability, GA4F—  
 23 when running as marketed—allows Google to collect information about an individual’s ‘activity on  
 24 . . . apps . . . that use Google services,’ notwithstanding the WAA Materials’ statement that ‘[t]o let  
 25 Google save this information . . . Web & App Activity must be on.’” *Id.* at 6. (original emphasis and  
 26 alterations).

27      And the same theory is what ultimately was certified by the Court for a class trial. ECF No.  
 28 352. In particular, the Court accepted Plaintiffs’ argument that the only questions necessary to  
 decide this case are (1) what Google represented, (2) what Google’s uniform conduct was, and (3)  
 whether any variance between them rises to the level of liability. *E.g., id.* at 11.

29      The answers to these three questions are straightforward. (1) Google represented that the  
 30 WAA button would control whether Google had permission to save activity data to the user’s

1 Google Account. (2) Google does not save activity data to the user’s Google Account when (s)WAA  
 2 is off. And (3) Google’s practice of keeping basic, pseudonymous records of its advertising does  
 3 not deviate from its representations concerning (s)WAA. Therefore, there is no liability under the  
 4 CDAFA or Plaintiffs’ invasion of privacy claims.

5 **A. Plaintiffs consented.**

6 Consent is an absolute defense to each of Plaintiffs’ remaining claims: CDAFA, invasion of  
 7 privacy, and constitutional invasion of privacy. Because no reasonable juror could find that  
 8 Plaintiffs reasonably believed (s)WAA did what they claim, Google’s consent defense alone  
 9 requires a full dismissal of Plaintiffs’ claims.

10 In granting class certification, this Court accepted Plaintiffs’ argument that “express consent  
 11 does not defeat predominance because the “‘sWAA disclosures and Google’s Privacy Policy’ are  
 12 the only relevant materials for analysis, and are ‘the same for all class members.’” ECF No. 352, at  
 13 15 (quoting Plaintiffs’ Class Cert. Reply, at 10). The Court held that Google’s consent defense could  
 14 be decided class-wide because “Google’s representations about the WAA feature, unambiguous and  
 15 persistent by its own admission, outweigh these individual questions about where class members  
 16 learned about the WAA feature.”<sup>20</sup> *Id.* at 15–16.

17 Now is the time to make that determination. Plaintiffs by their own argument invited an  
 18 evaluation of these two sets of uniform representations. If these representations are unambiguous,  
 19 or are not susceptible to Plaintiffs’ reading of them, their case must end.

20 The representations are unambiguous. As discussed above, the description of (s)WAA was  
 21 plain and straightforward: the button controls whether Google has permission to “save” “web & app  
 22 activity data” to a user’s “Google Account.”<sup>21</sup> Google does not “save” “app activity data” sent to it  
 23 via GA4F or the Google Ads products in question, or any product or service addressed by Plaintiffs,  
 24

---

25 <sup>20</sup> Google also argued that class members consented in various ways to Google’s conduct by consenting to  
 26 third party apps’ privacy policies. This Court ruled that such consent was not relevant to Google’s liability,  
 27 which could be determined class-wide, because “the relevant question concerns Google’s disclosures about  
 28 the sWAA button, not third-party disclosures to users,” and “[t]o the extent Google had a policy that required  
 third party apps to disclose Google’s policies to users, that evidence may be applied across the class.” ECF  
 No. 352, at 17. As such, these third party disclosures cannot now create a material issue of disputed fact.

<sup>21</sup> There is also a use limitation in how (s)WAA is described: that the permission is for using the data to  
 “personalize experiences” across Google. Compl., ECF No. 1, at ¶ 49.

1 to a user’s “Google Account.” *See* Interrog. Set One Resps., ECF No. 364-1, at 23:27–24:7 (Appx.  
 2 A-13). Instead, Google’s uniform policy and practice is to take significant steps to separate (s)WAA  
 3 off data from any personally identifiable information belonging to the end user who generated the  
 4 data. *See id.* at 24:5–28:2, & App’x X4 to Black Rpt., (Appx. A-16).

5 To the extent any user was confused by the plain meaning of the (s)WAA representations,  
 6 they were also uniformly presented with Google’s Privacy Policy and Privacy Portal, which  
 7 repeated the distinction between data saved to a “Google Account” and data that is not “associated  
 8 with personal information” in numerous places. *See supra* III.B. (discussing historic representations  
 9 made in Google’s Privacy Policies, ECF No. 323-1 (Appx. A-7)).

10 There is no ambiguity to be exploited here. For four years, Plaintiffs have repeated their  
 11 constant refrain that “off” means “off”; that (s)WAA was a light switch, and that whatever (s)WAA  
 12 meant, turning it off should do the opposite of what turning it on does. There is no dispute that this  
 13 is exactly how the button works, but Plaintiffs press the theory that the (s)WAA button should stop  
 14 *all* data flow to Google from any Google product or service if Google knows the end user has  
 15 (s)WAA off — every bit and byte. But that is not what the (s)WAA button representations say. For  
 16 Plaintiffs to prevail on any of their claims, a reasonable juror would have to conclude that the phrase  
 17 “to your Google Account” in the (s)WAA description was surplusage, otherwise that limitation must  
 18 mean *something*, and so it cannot be that the button should stop *all* data flow. Because no reasonable  
 19 juror can so conclude, Plaintiffs cannot prevail. As a matter of law, they consented.

20 Finally, Plaintiffs’ Motion for Class Certification grossly misused internal e-mails and user  
 21 studies to suggest that the record-keeping that is now the focus of their case was considered  
 22 internally at Google and concluded by certain employees to violate the promise of WAA. None of  
 23 those documents supported Plaintiffs’ position, because there is *no* evidence that any Google  
 24 employee ever believed that the WAA button would somehow disable all advertising by stopping  
 25 the flow of all data between a mobile app seeking to serve an ad and Google, or disable the logging  
 26 of basic ad events like conversions. Indeed, each employee and former employee asked about this  
 27 in deposition denied that they ever shared Plaintiffs’ extreme reading of WAA, even as they  
 28 internally expressed unrelated concerns about WAA that are not a basis for this case.

1           **B. Plaintiffs cannot maintain their privacy torts for independent reasons.**

2           From the start, this case was manufactured around a creative, lawyerly, *unreasonable*  
 3 reading of the (s)WAA description coupled with the incorrect allegation that Google was collecting  
 4 personally identifiable (s)WAA-off activity data. It wasn't, it doesn't, and the pseudonymous data  
 5 it *does* collect is collected lawfully. As a result, the fundamental premise of Plaintiffs' privacy  
 6 claims, that Google intentionally violated a reasonable expectation of privacy in a highly offensive  
 7 manner causing harm, has no factual basis. *See Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200,  
 8 232 (1998) (reciting elements).

9           **No expectation of privacy.** There is no dispute: (s)WAA-off data is not saved to a user's  
 10 Google Account, and is not associated with any individual user's identity. Instead (s)WAA-off data  
 11 is logged with random number identifiers that cannot be joined with any person. Courts in this  
 12 district do not recognize a privacy interest in non-personal information. For example, there is no  
 13 "protected privacy interest" in a randomly generated "numeric code" that cannot be associated with  
 14 a user's identity. *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1025 (N.D. Cal. 2012). And courts  
 15 have already held that if "app activity data [is] not tied to any personally identifiable information,  
 16 [is] anonymized, and [is] aggregated," that does not rise to the level of invasion of privacy or  
 17 intrusion upon seclusion "in this district." *McCoy v. Alphabet, Inc.*, No. 20-CV-05427-SVK, 2021  
 18 WL 405816, at \*8 (N.D. Cal. Feb. 2, 2021). Most recently, a Ninth Circuit panel concluded that  
 19 Google's clear disclosure in its Privacy Policy that it may receive user activity data across "third-  
 20 party sites and apps that use Google services," including from the "Android operating system,"  
 21 means users cannot have a reasonable expectation of privacy in their app activity data on Android  
 22 devices vis-à-vis Google, as these apps utilize the Android OS. *Hammerling v. Google, LLC*, No.  
 23 22-17024, (9th Cir. Mar. 5, 2024) (unpublished).

24           This outcome makes sense. Nobody who uses mobile apps reasonably believes that they can  
 25 grind the mobile ads ecosystem to a halt by flipping a single button (or any other way). Even when  
 26 personalization of advertising is disabled, advertising can still be served in spaces where apps  
 27 choose to sell advertising space. And the server of those apps will of course keep a log that the ad  
 28 was served. Under Plaintiffs' theory, ads served in a mobile app that were selected *at random*

1 violated their privacy because they expected the (s)WAA button to disable the entire data flow from  
 2 the app to Google, no matter how anonymous. That theory cannot square with any reasonable  
 3 definition of expectation of privacy.

4 Nor does the (s)WAA toggle set an expectation of privacy in pseudonymous data. The  
 5 disclosures Google made in its (s)WAA description and its Privacy Policy unambiguously and  
 6 uniformly explain that (s)WAA controls whether activity data is saved to a user's Google Account,  
 7 *i.e.*, associated with their identity. Wherever these concepts are discussed in the Privacy Policy,  
 8 Google's distinction between "your Google Account" and "non-personal information" is clear and  
 9 unambiguous, and the Privacy Policy also makes clear that privacy controls, including (s)WAA, can  
 10 toggle whether Google collects personal information, but that it will continue to keep basic records  
 11 with non-personal information and report that basic record information to advertisers. *See* Privacy  
 12 Policies, ECF 323-1, at 4–9, 11, 15–17, 23, 52, 54–55, 57 (Appx. A-7). Nor can there be a triable  
 13 issue here based solely on Plaintiffs' confusion despite these unambiguous disclosures, as that  
 14 would fatally undermine their class certification theory, which presumes that the class was  
 15 uniformly exposed to these disclosures and asks the factfinder to determine class-wide whether the  
 16 class was reasonably confused.

17 **Not highly offensive.** Data sent to Google by apps using GA4F is handled consistently with  
 18 Google's description of (s)WAA. There is no dispute that Plaintiffs were subject to Google's  
 19 disclosures, and accepted Google's terms of service. Google disclosed the collection of  
 20 pseudonymous data notwithstanding (s)WAA. No reasonable person would find disclosed and  
 21 agreed-upon conduct highly offensive.

22 Per Google's disclosures, a user's app activity data collected via GA4F is never saved to  
 23 their Google Account (or associated with their personal identity in any other way for that matter) if  
 24 (s)WAA is off. Nor could the collection of such data be considered "an egregious breach of social  
 25 norms" or "intrusion [] in a manner highly offensive to a reasonable person." *See also Williams v*  
*26 DDR Media, LLC*, No. 22-cv-03789-SI, 2023 WL 5352896 at \*5-6 (N.D. Cal. Aug. 18, 2023); *City*  
*27 & Cnty. of San Francisco v. Purdue Pharma L.P.*, No. 18-CV-07591-CRB, 2021 WL 842574, at \*2  
 28 (N.D. Cal. Mar. 5, 2021) (holding no privacy concerns in de-identified information in discovery

1 dispute); *London v. New Albertson's, Inc.*, No. 08-CV-1173 H(CAB), 2008 WL 4492642, at \*8  
 2 (S.D. Cal. Sept. 30, 2008) (same). Thus, “there is no plausible allegation that [Google] tracked  
 3 Plaintiff’s location as opposed to some anonymous clientid that is not matched to any particular  
 4 person.”<sup>22</sup> *Moreno v. San Francisco Bay Area Rapid Transit Dist.*, No. 17-CV-02911-JSC, 2017  
 5 WL 6387764, at \*4 (N.D. Cal. Dec. 14, 2017) (emphasis in original).

6 This makes good sense. Google has taken significant steps to bar the very practice that  
 7 Plaintiffs allege occurred here—the *personal* tracking of a user despite their decision to turn  
 8 (s)WAA off. Even if it was reasonable for users to review the WAA disclosure and related  
 9 disclosures and conclude that turning off (s)WAA would prevent Google from retaining any record  
 10 that it served an ad to a device identifier that is never associated with the user’s identity, no  
 11 reasonable juror could conclude on these facts that Google’s retaining such a record is highly  
 12 offensive, because the record does not identify anything about anyone—a far cry from anything  
 13 approaching actionable invasion of privacy.

14 **No intent.** To the extent a reasonable juror could conclude that there is any daylight between  
 15 the description of (s)WAA and the Privacy Policy on one hand and Google’s uniform conduct on  
 16 the other hand, no reasonable juror could conclude that Google **intentionally** invaded the privacy  
 17 of or intruded upon the seclusion of class members. To the contrary, Google took substantial steps—  
 18 far beyond the steps it was obligated to take—to prevent bad actors and its own employees from  
 19 invading class members’ privacy. Google contractually forbade app developers from sending it  
 20 personally identifiable information, it instituted technologically sophisticated safeguards to  
 21 maintain users’ identity separate from the app activity data it stored for app developers, and it  
 22 disabled itself from using the data for any purpose other than those disclosed to users in the Privacy  
 23 Policy—basic record-keeping about its advertising business (and *not* any ads personalization or  
 24 building of marketing profiles). Even if a reasonable juror could find that Google’s description of  
 25 the (s)WAA button deviated in some way from Google’s uniform conduct, no reasonable juror could  
 26 conclude that this variance was done with the intent required to commit the intentional tort of  
 27

---

28 <sup>22</sup> Nor is it sufficient to “postulate that [] third parties could, through inferences, de-anonymize this data” if  
 it is “not clear that anyone has actually done so.” *Low*, 900 F. Supp. 2d at 1025.

1 invasion of privacy. *See Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056 (N.D. Cal. 2016)  
 2 (finding that intrusion upon seclusion or intentional infliction of emotional distress claims require  
 3 intent on the part of the tortfeasor); *see also In re Accellion, Inc. Data Breach Litig.*, No. 5:21-CV-  
 4 01155-EJD, 2024 WL 333893, at \*16 (N.D. Cal. Jan. 29, 2024) (dismissing plaintiffs’ intrusion  
 5 upon seclusion claim where complaint failed to allege that defendant “intentionally intruded” or that  
 6 the intrusion was highly offensive). As a matter of law, the undisputed facts cannot make out the  
 7 intent element of the privacy torts.

8 Because Plaintiffs cannot establish any of the elements of their privacy claims, summary  
 9 judgment should be granted in Google’s favor on those claims.

10 **C. Plaintiffs cannot establish harm for any of their claims.**

11 Harm is a necessary element of the intentional torts and Plaintiffs’ CDAFA claim, and  
 12 Plaintiffs cannot show any harm to the class as a result of Google’s conduct. *See Perkins v. LinkedIn*  
 13 *Corp.*, 53 F. Supp. 3d 1190, 1219 (N.D. Cal. 2014) (dismissing plaintiffs’ CDAFA claims on the  
 14 basis that Plaintiffs did not adequately allege that they had suffered any “tangible harm from the  
 15 alleged Section 502 violations”); *Hammerling v. Google LLC*, 615 F. Supp. 3d 1069, 1090 (N.D.  
 16 Cal. 2022) (“Determining whether a defendant’s actions were ‘highly offensive to a reasonable  
 17 person’ requires a ‘holistic consideration of factors such as the ***likelihood of serious harm*** to the  
 18 victim, the degree and setting of the intrusion, the intruder’s motives and objectives, and whether  
 19 countervailing interests or social norms render the intrusion inoffensive.’”) (quoting *Facebook*  
 20 *Tracking*, 956 F.3d at 606 (quoting *Hernandez v. Hillsides, Inc.*, 211 P.3d 1063, 1073 (2009))  
 21 (emphasis added)).

22 Google opposed class certification in part on the basis of individualized harm inquiries. The  
 23 Court rejected that argument and accepted that Plaintiffs could demonstrate class-wide harm,  
 24 reasoning that “even if Google is right, and the ‘vast majority’ of class members’ data was only  
 25 exposed to record-keeping ‘not tied to a person’s identity or used by Google for any purpose other  
 26 than to perform accounting for the apps that generated the data or advertising in the first place,’  
 27 Opp., at 16, then surely that can be proven by common evidence of Google’s record-keeping  
 28 practices.” ECF No. 352, at 12. Plaintiffs’ certified class thus must proceed on a theory that the

1 money Google made by keeping receipts for the advertising it sold is the appropriate measure of  
 2 class-wide damages, regardless of whether keeping receipts harmed any individual class member.

3 The problem with this theory is that Google's conduct cannot be said to have harmed any  
 4 class member in particular or the class at large, because its conduct did not exploit any class  
 5 member's privacy, did not intrude upon their private space, or take from them something they  
 6 intended to keep for themselves or sell to another, *i.e.*, pseudonymous data about their use of  
 7 Firebase-enabled apps. No court has ever found that such basic record-keeping is harmful to anyone.

8 To fix this problem, Plaintiffs have previously relied on an entitlement to disgorgement of  
 9 profits to allege harm under their tort and CDAFA claims, based on a single sentence in the Ninth  
 10 Circuit's decision in *Facebook Internet Tracking*, 956 F.3d 589. But, as Judge Chhabria has pointed  
 11 out, the court's analysis on this was solely focused on Article III standing, not the damage or harm  
 12 required to establish liability under Plaintiffs' tort and CDAFA claims. *See McClung*, 2024 WL  
 13 189006, at \*2. ("The Court continues to be skeptical of the plaintiffs' theory that California's  
 14 statutory standing requirement for these claims can be satisfied simply by alleging that the defendant  
 15 was unjustly enriched by the misappropriation of personal information."). Further, "the Article III  
 16 analysis in that section of *Facebook Internet Tracking* has been superseded by *TransUnion*, making  
 17 it even more of a stretch to rely on that section as an implicit statement about statutory standing  
 18 under California law. *Id.* at n.2 (citing *TransUnion*, 594 U.S. at 426–30).

19 Finally, to the extent Plaintiffs seek to rely on the subjective experiences of the Named  
 20 Plaintiffs, that would belie the theory of damages Plaintiffs pushed in order to certify the class. They  
 21 cannot now backtrack and argue that the idiosyncratic emotional experiences of 100 million class  
 22 members can be proven class-wide; obviously they cannot be. In other words, Plaintiffs argued  
 23 themselves into a corner: they cannot tell this Court that they need not prove actual damages in order  
 24 to certify a class, only to argue now in opposition to summary judgment that they can prove actual  
 25 class-wide harm using common proof. The two are irreconcilable.

26 **D. Plaintiffs' analysis of the CDAFA claim's "without permission" requirement focuses on  
 27 the wrong permission-giver.**

28 Plaintiffs' CDAFA claim fails for the reasons discussed above. But the CDAFA claim fails

1 for the additional reason that Plaintiffs cannot establish that Google acted “without permission,”  
 2 even if app developers’ end users failed to consent to their use of GA4F by virtue of their (s)WAA  
 3 settings, because the most correct lens to view this claim through is one that focuses on Google’s  
 4 permission vis-à-vis the app developers, not the end users.

5 Google never exceeded the scope of its permission to use the data gathered by app  
 6 developers and sent to Google via GA4F because it is undisputed that (1) Google required app  
 7 developers to obtain consent from end users for their use of GA4F (*See* Google’s Resp. to  
 8 Plaintiffs’ Interrog., Set Six, ECF No. 364-22, at 10:25–11:18 (Appx. A-22)) and (2) Plaintiffs do  
 9 not allege an invasion of their privacy solely by virtue of Google’s function as *data processor* for  
 10 app developers as their agent. Nor could they: Courts in this district have already held that when a  
 11 tech company acts as a vendor for another, its scope of consent is coterminous with the party to the  
 12 communication. *See Graham v. Noom, Inc.*, 533 F. Supp. 3d 823, 833 (N.D. Cal. 2021); *Williams*  
 13 v. *What If Holdings, LLC*, No. C. 22-03780 WHA, 2022 WL 17869275, at \*3 (N.D. Cal. Dec. 22,  
 14 2022); *see also Byars v. Hot Topic, Inc.*, 656 F. Supp. 3d 1051, 1067–68 (C.D. Cal. 2023); *Johnson*  
 15 v. *Blue Nile, Inc.*, No. 20-cv-08183-LB, 2021 WL 1312771, at \*1 (N.D. Cal. Apr. 8, 2021); *Yale v.*  
 16 *Clicktale, Inc.*, No. 20-cv-07575-LB, 2021 WL 1428400, at \*3 (N.D. Cal. Apr. 15, 2021).

17 Here, none of Google’s conduct falls outside the scope of its role as vendor for the app  
 18 developers. Google does not make copies of the (s)WAA-off data for itself to, e.g., enhance its  
 19 marketing profiles or better personalize advertising. It does not sell or exploit the data. It processes  
 20 the data sent to it under contracts with third party entities who collected it. And those contracts  
 21 permit Google to use the data for various uses. Plaintiffs have never alleged that Google exceeded  
 22 that scope of permission, so no CDAFA claim could lie.

## 23 VI. CONCLUSION

24 For the foregoing reasons, the Court should dismiss this case with prejudice.

1 Dated: April 4, 2024

Respectfully submitted,  
2 WILLKIE FARR & GALLAGHER LLP  
3

4 By: /s/ Eduardo E. Santacana

5 Benedict Y. Hur  
6 Simona Agnolucci  
7 Eduardo E. Santacana  
8 Argemira Flórez  
9 Harris Mateen

10  
11 *Attorneys for Defendant*  
12 *Google LLC*  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

# EXHIBIT 2

**WILLKIE FARR & GALLAGHER LLP**  
BENEDICT Y. HUR (SBN: 224018)  
[bhur@willkie.com](mailto:bhur@willkie.com)  
SIMONA AGNOLUCCI (SBN: 246943)  
[sagnolucci@willkie.com](mailto:sagnolucci@willkie.com)  
EDUARDO E. SANTACANA (SBN: 281668)  
[esantacana@willkie.com](mailto:esantacana@willkie.com)  
ARGEMIRA FLÓREZ (SBN: 331153)  
[aflorez@willkie.com](mailto:aflorez@willkie.com)  
HARRIS MATEEN (SBN: 335593)  
[hmateen@willkie.com](mailto:hmateen@willkie.com)  
333 Bush Street, 34<sup>th</sup> Floor  
San Francisco, CA 94104  
Telephone: (415) 858-7400

Attorneys for Defendant  
GOOGLE LLC

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

ANIBAL RODRIGUEZ, *et al.* individually and on behalf of all others similarly situated.

**Plaintiff,**

VS.

GOOGLE LLC, *et al.*

**Defendant**

Case No. 3:20-CV-04688 RS

## **GOOGLE LLC'S MOTION FOR SUMMARY JUDGMENT**

Date: July 1125, 2024

Date: July 11<sup>th</sup>  
Time: 1:30 p.m.

Courtroom: 3, 17th Floor

Judge: Hon. Richard Seeborg

Action Filed: July 14, 2020

Trial Date: February 10, 2025

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	PROCEDURAL BACKGROUND.....	<u>33</u>
	A.    Plaintiffs' <u>Originaloriginal</u> Complaint and Google's Motions to Dismiss .....	<u>33</u>
	B.    Plaintiffs' <u>Theorytheory</u> of <u>Liabilityliability</u> on the <u>Pleadingspleadings</u> .....	<u>44</u>
	C.    The <u>Discoverydiscovery Periodperiod</u> .....	<u>66</u>
	D.    The Court's Order <u>Grantinggranting</u> Class Certification.....	<u>66</u>
III.	STATEMENT OF FACTS .....	<u>77</u>
	A.    Plaintiffs concede that Google does not personalize advertising with (s)WAA-off data; the certified theory of liability challenges basic, pseudonymous record-keeping. ....	<u>77</u>
	B.    Google represented that the WAA button controlled whether data would be "saved to your Google Account," <i>i.e.</i> , "associated with your personal information." .....	<u>1144</u>
	C.    Google's disclosures uniformly and unambiguously explained that it could use non-personal information for basic record-keeping.....	<u>1212</u>
	D.    Google never "saves to a user's Google Account," <i>i.e.</i> , personally identifies, (s)WAA-off Analytics or Ads data.....	<u>1414</u>
	E.    Google has erected technical barriers to the joining of (s)WAA-off data with GAIA-keyed data.....	<u>1515</u>
IV.	UNDISPUTED MATERIAL FACTS .....	<u>1616</u>
V.	ARGUMENT .....	<u>1717</u>
	A.    Plaintiffs consented.....	<u>1818</u>
	B.    Plaintiffs cannot maintain their privacy torts for independent reasons.....	20
	C.    Plaintiffs cannot establish harm for any of their claims. ....	<u>2323</u>
	D.    Plaintiffs' analysis of the CDAFA claim's "without permission" requirement focuses on the wrong permission-giver. ....	<u>2525</u>
VI.	CONCLUSION.....	<u>2626</u>

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	PROCEDURAL BACKGROUND.....	<u>33</u>
	A.    Plaintiffs' <u>Originaloriginal</u> Complaint and Google's Motions to Dismiss .....	<u>33</u>
	B.    Plaintiffs' <u>Theorytheory</u> of <u>Liabilityliability</u> on the <u>Pleadingspleadings</u> .....	<u>44</u>
	C.    The <u>Discoverydiscovery Periodperiod</u> .....	<u>66</u>
	D.    The Court's Order <u>Grantinggranting</u> Class Certification.....	<u>66</u>
III.	STATEMENT OF FACTS .....	<u>77</u>
	A.    Plaintiffs concede that Google does not personalize advertising with (s)WAA-off data; the certified theory of liability challenges basic, pseudonymous record-keeping. ....	<u>77</u>
	B.    Google represented that the WAA button controlled whether data would be "saved to your Google Account," <i>i.e.</i> , "associated with your personal information." .....	<u>1111</u>
	C.    Google's disclosures uniformly and unambiguously explained that it could use non-personal information for basic record-keeping.....	<u>1212</u>
	D.    Google never "saves to a user's Google Account," <i>i.e.</i> , personally identifies, (s)WAA-off Analytics or Ads data.....	<u>1414</u>
	E.    Google has erected technical barriers to the joining of (s)WAA-off data with GAIA-keyed data.....	<u>1515</u>
IV.	UNDISPUTED MATERIAL FACTS .....	<u>1616</u>
V.	ARGUMENT .....	<u>1717</u>
	A.    Plaintiffs consented.....	<u>1818</u>
	B.    Plaintiffs cannot maintain their privacy torts for independent reasons.....	20
	C.    Plaintiffs cannot establish harm for any of their claims. ....	<u>2323</u>
	D.    Plaintiffs' analysis of the CDAFA claim's "without permission" requirement focuses on the wrong permission-giver. ....	<u>2525</u>
VI.	CONCLUSION.....	<u>2626</u>

## TABLE OF AUTHORITIES

Page(s)

## Cases

<i>In re Accellion, Inc. Data Breach Litig.</i> , No. 5:21-CV-01155-EJD, 2024 WL 333893 (N.D. Cal. Jan. 29, 2024).....	23
<i>Byars v. Hot Topic, Inc.</i> , 656 F. Supp. 3d 1051 (C.D. Cal. 2023) .....	25
<i>Caraccioli v. Facebook, Inc.</i> , 167 F. Supp. 3d 1056 (N.D. Cal. 2016).....	23
<i>City &amp; Cnty. of San Francisco v. Purdue Pharma L.P.</i> , No. 18-CV-07591-CRB, 2021 WL 842574 (N.D. Cal. Mar. 5, 2021) .....	<u>2221</u>
<i>In re Facebook, Inc. Internet Tracking Litig.</i> , 956 F.3d 589 (9th Cir. 2020) .....	2, 24
<i>Graham v. Noom, Inc.</i> , 533 F. Supp. 3d 823 (N.D. Cal. 2021) .....	25
<i>Hammerling v. Google LLC</i> , 615 F. Supp. 3d 1069 (N.D. Cal. 2022) .....	23
<i>Hammerling v. Google, LLC</i> , No. 22-17024 (9th Cir. Mar. 5, 2024) ( <u>Unpublished</u> <u>unpublished</u> ) .....	20
<i>Hernandez v. Hillsides, Inc.</i> , <u>211 P.3d 1063, 1073 (2009)</u> .....	23
<i>Johnson v. Blue Nile, Inc.</i> , No. 20-cv-08183-LB, 2021 WL 1312771 (N.D. Cal. Apr. 8, 2021) .....	25
<i>London v. New Albertson's, Inc.</i> , No. 08-CV-1173 <u>H(CAB), 2008 WL 4492642 (S.D. Cal. Sept. 30, 2008)</u> .....	22
<i>Low v. LinkedIn Corp.</i> , 900 F. Supp. 2d 1010 (N.D. Cal. 2012) .....	20, 22
<i>McClung v. AddShopper, Inc.</i> , No. 23-cv-01996-VC, 2024 WL 189006 (N.D. Cal. Jan. 17, 2024).....	<u>2-</u> , 24
<i>McCoy v. Alphabet, Inc.</i> , No. 20-CV-05427-SVK, 2021 WL 405816 (N.D. Cal. Feb. 2, 2021) .....	20
<i>Moreno v. San Francisco Bay Area Rapid Transit Dist.</i> , No. 17-CV-02911-JSC, 2017 WL 6387764 (N.D. Cal. Dec. 14, 2017) .....	22

1	<i>Perkins v. LinkedIn Corp.</i> , 53 F. Supp. 3d 1190 (N.D. Cal. 2014) .....	23
2		
3	<i>Shulman v. Grp. W Prods., Inc.</i> , 18 Cal. 4th 200 (1998) .....	20
4		
5	<i>TransUnion LLC v. Ramirez</i> , 594 U.S. 413 (2021).....	2, 24
6		
7	<i>Williams v DDR Media, LLC</i> , No. 22-cv-03789-SI, 2023 WL 5352896 (N.D. Cal. Aug. 18, 2023) .....	<u>2221</u>
8		
9	<i>Williams v. What If Holdings, LLC</i> , No. C. 22-03780 WHA, 2022 WL 17869275 (N.D. Cal. Dec. 22, 2022) .....	25;
10		
11	<i>Yale v. Clicktale, Inc.</i> , No. 20-cv-07575-LB, 2021 WL 1428400 (N.D. Cal. Apr. 15, 2021) .....	25
12		
13	<b>Statutes</b>	
14		
15	California Comprehensive Computer Data Access and Fraud Act, Cal. Penal Code § 502 <i>et seq.</i> .....	<i>passim</i>
16		
17	California Unfair Competition Law, Bus. & Prof. Code § 17200, <i>et seq.</i> .....	3
18	<b>CDAFA</b> .....	
19		
20	<b>CIPA, and the Unfair Competition Law section 632</b> .....	<u>California Invasion of Privacy Act</u> <sup>3</sup>
21		
22	Federal Wiretap Act .....	3, 44
23		
24	<b>Privacy Act</b> .....	
25		
26		
27		
28		

1           **I. INTRODUCTION**

2           This case started with Plaintiffs' allegation that data generated when users had turned off  
 3 their Web & App Activity settings "is combined by Google into a user profile with all the other  
 4 detailed, user-specific data Google collects on individuals and their devices," which "Google then  
 5 uses [] to help generate billions of dollars in advertising revenues without users' consent." Compl.,  
 6 ECF No. 1<sup>1</sup>, at ¶¶ 37–39, 141–143, 146. None of that was true. Four years, hundreds of thousands  
 7 of pages of produced documents, and almost 200 hours of fact and expert deposition testimony later,  
 8 Plaintiffs have failed to produce a single shred of evidence substantiating that allegation. So, out of  
 9 the ashes of their original theory, Plaintiffs seek to resurrect their case with the claim that Google  
 10 should not have kept non-identifiable receipts for the ads it serves. And, the tortured theory goes,  
 11 had Google not kept those receipts, advertisers would have refused to pay for advertising, so all of  
 12 Google's advertising profit for ads served to WAA-off users should be forfeited. On that basis,  
 13 Plaintiffs seek to convert their picayune liability theory into a half-billion dollar demand for class-  
 14 wide judgment.

15           Since the allegations of Plaintiffs' current, certified theory—that Google promised not to  
 16 engage in record-keeping, that Plaintiffs had a reasonable expectation the record-keeping would not  
 17 occur, and that Plaintiffs suffered harm as a result of the record-keeping—are completely lacking in  
 18 factual basis, the Court should grant summary judgment and dismiss this case with prejudice.

19           First, Google repeatedly disclosed and secured the consent for its basic record-keeping  
 20 practices, which involve logging "non-personal information" for the purpose of reporting how ads  
 21 and mobile apps are performing.

22           Second, each Plaintiff saw these disclosures, but argues that the WAA webpage led them to  
 23 believe they could disable Google's record-keeping by switching WAA to "off." But the WAA  
 24 webpage describes the button as a way to give or withhold permission for Google to "save" app  
 25 activity data "to your Google Account" for the purpose of "personaliz[ing]" the user's experience.  
 26 There is no reasonable interpretation of this language, in isolation or in concert with the Privacy

---

27           28           <sup>1</sup> Google will submit a hard-copy courtesy booklet of selected docket entries that are not listed in Appendix  
 A (Evidentiary Material) or Appendix B (Previously Filed Under Seal Material) for the Court's ease of  
 reference.

1 Policy, that extends the ambit of the WAA control to Google's non-personal record-keeping. And  
 2 to the extent it was not immediately obvious from the WAA webpage that "to your Google Account"  
 3 limited the ambit of the control, the Privacy Policy, which each Plaintiff alleges they reviewed,  
 4 repeatedly explained that Google distinguishes between personally identifiable information and  
 5 non-personal information.<sup>2</sup> The information Google used to keep its records was non-personal  
 6 information, and Google used it in the precise ways it told Plaintiffs it would.

7 Third, Google did *not* use the information at issue to target or personalize ads, or build  
 8 marketing profiles of WAA-off users. Plaintiffs originally alleged Google did so, but they never had  
 9 a basis to make this allegation, and they abandoned that theory at class certification.

10 Finally, Google's basic record-keeping doesn't hurt anyone. Logging the fact that Google  
 11 has served an ad to a randomly generated identifier that is never linked to a Google user's identity  
 12 cannot be said to have exploited any class member's privacy, nor intruded upon their private space,  
 13 nor taken from them anything they intended to keep for themselves or sell to another.

14 Nor can Plaintiffs fall back on disgorgement of profits as a basis to establish Article III or  
 15 statutory standing, nor harm for their privacy torts. While the Ninth Circuit had, in a single sentence,  
 16 ruled that such claimants can establish Article III standing in *In re Facebook, Inc. Internet Tracking*  
 17 *Litig.*, 956 F.3d 589 (9th Cir. 2020), that is no longer good law in the wake of *TransUnion*. See  
 18 *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424–25 (2021). Nor did the Ninth Circuit purport to  
 19 rule on the question of statutory standing or the element of harm required for privacy torts.<sup>3</sup>

---

20  
 21 <sup>2</sup> See Declaration of Anibal Rodriguez in Support of Class Certification, ECF No. 315-7, at ¶ 3 (Appx. A-5)  
 22 ("When I opened my Google account in 2014, and in the years before filing this lawsuit, I had read Google's  
 23 Terms of Service, Privacy Policy, and other Google disclosures to understand what data was and was not  
 24 collected when WAA and sWAA were turned off. I agreed to those terms."); Decl. of Sal Cataldo, ECF No.  
 25 315-5, at ¶ 3 (Appx. A-3) (same); Decl. of Julian Santiago, ECF No. 315-8 (Appx. A-6) (same); Decl. of  
 26 Susan Harvey, ECF No. 315-6, at ¶ 3 (Appx. A-4) (same).

27 <sup>3</sup> See *McClung v. AddShopper, Inc.*, No. 23-cv-01996-VC, 2024 WL 189006, at \*2 (N.D. Cal. Jan. 17, 2024)  
 28 ("The Court continues to be skeptical of the plaintiffs' plaintiffs' theory that California's California's  
 29 statutory standing requirement for these claims can be satisfied simply by alleging that the defendant was  
 30 unjustly enriched by the misappropriation of personal information . . ." and "[T]he Article III analysis in that  
 section of *Facebook Internet Tracking* has been superseded by *TransUnion*, making it even more of a stretch  
 to rely on that section as an implicit statement about statutory standing under California law.") (citing  
*TransUnion*, 594 U.S. at 426–30); see also *id.* (citing *Hazel v. Prudential Financial, Inc.*, No. 22-cv-07465-  
 CRB, 2023 WL 3933073, at \*6 (N.D. Cal. June 9, 2023) ("Just because Plaintiffs' data is valuable in the  
 abstract, and because [a company] might have made money from it, does not mean that Plaintiffs have 'lost  
 money or property' as a result.").

1           **II. PROCEDURAL BACKGROUND**

2           **A. Plaintiffs' ~~Original~~original Complaint and Google's Motions to Dismiss**

3           Plaintiffs filed their original complaint against Google LLC and Alphabet Inc. in July 2020,  
 4 asserting claims for violation of the Federal Wiretap Act, section 631 (wiretap) and 632  
 5 (eavesdropping) of the California Invasion of Privacy Act (~~“CIPA”~~), invasion of privacy, and  
 6 violation of the California Comprehensive Computer Data Access and Fraud Act (~~“CDAFA”~~),  
 7 Cal. Penal Code § 502 *et seq.* ECF No. 1.<sup>4</sup> Google moved to dismiss in October 2020, ECF No. 48,  
 8 and Plaintiffs amended their complaint rather than oppose, (First Am. Compl. (“FAC”)), ECF  
 9 No. 60. The FAC added several Plaintiffs, many of whom have since voluntarily withdrawn from  
 10 the case.<sup>5</sup> The FAC also asserted two more causes of action for violation of the California Unfair  
 11 Competition Law, Bus. & Prof. Code § 17200, *et seq.* and for common law intrusion upon seclusion.

12           Google moved to dismiss every claim in the FAC. ECF No. 62. This Court ruled on that  
 13 motion on May 21, 2021, granting the motion with leave to amend as to Plaintiffs' claims for  
 14 violation of the Federal Wiretap Act, section 632 of CIPA, and the Unfair Competition Law. ECF  
 15 No. 109, at 17–18. Applying Rule 9(b), the Court also dismissed Plaintiffs' theory of the case as to  
 16 purported “secret scripts” embedded in Google's Android mobile operating system that supposedly  
 17 facilitated unlawful interceptions of communications, again with leave to amend. *Id.* at 11–12.

18           Plaintiffs' Second Amended Complaint (“SAC”) dropped the Federal Wiretap Act and  
 19 Unfair Competition Law claims, and disavowed the “secret scripts” theory, but added a breach of  
 20 contract claim. ECF No. 113, at 68–71. Google moved to dismiss again, this time only as to  
 21 Plaintiffs' claims for breach of contract and violation of section 631 of ~~the Invasion of Privacy~~  
 22 ~~Act~~CIPA. ECF No. 115. This Court granted Google's motion as to both claims, holding that  
 23 Plaintiffs failed to state a claim for relief as to breach of contract, and that Plaintiffs' allegations  
 24 established that Google's alleged wrongful use of recorded communications between users and app  
 25 developers took the alleged conduct outside the ambit of CIPA section 631, since that statute

27           <sup>4</sup> All references to “ECF” are for docket entries in the above-captioned matter. Google also provides cited  
 28 ECF entries to the Court in its “Courtesy Copy of Selection of Docket Entries.”

5           <sup>5</sup> The withdrawn Plaintiffs are: Eliza Cambay, Emir Goenaga, JulieAnna Muniz, Julian Santiago, Harold  
 Nyanjom, and Kellie Nyanjom.

1 requires simultaneous wiretapping for liability. ECF No. 127. In their ~~Second Amended~~  
 2 ~~Complaint~~SAC, Plaintiffs ~~had~~ also added factual allegations concerning the integration of Google  
 3 Analytics for Firebase with AdMob and with Firebase Cloud Messaging. This Court ruled those  
 4 allegations could stand because Plaintiffs put Google on notice of their allegations that Google  
 5 Analytics for Firebase and those two products are integrated such that the latter products use data  
 6 collected by the former. *Id.* at 3, 7–8.

7 Plaintiffs filed their Third Amended Complaint (“TAC”) on September 1, 2021, re-asserting  
 8 their breach of contract and CIPA section 631 claims. ECF No. 131 (unredacted at ECF No. 130).  
 9 Google moved to dismiss those claims again, ECF No. 139, and the Court dismissed them with  
 10 prejudice. ECF No. 209. Google answered the TAC on February 22, 2022. ECF No. 230.

11 Finally, in late 2022, two days before discovery closed, Plaintiffs sought to amend their  
 12 complaint again to add ~~in~~Google Search as an accused product in the case. ECF No. 258. This Court  
 13 denied that motion for leave to amend while permitting an unopposed amendment to the extant class  
 14 definitions. ECF No. 281. The operative Fourth Amended Complaint (“4AC”) was filed on January  
 15 4, 2023. ECF No. 289.

#### 16           B. Plaintiffs’ ~~Theory~~theory of ~~Liability~~liability on the ~~Pleadings~~pleadings

17 Through successive orders on Google’s motions to dismiss, this Court narrowed Plaintiffs’  
 18 case to a simple and straightforward claim. As described by the Court in its first Order on Google’s  
 19 Motion to Dismiss the FAC, Plaintiffs allege that Google Analytics (“GA”) for Firebase, a tool  
 20 Google provides to app developers for use on mobile devices, “when functioning as advertised in a  
 21 given app, contravenes [Google’s] user-facing privacy representations.” ECF No. 109, at 1. If, as  
 22 Plaintiffs allege, GA for Firebase (“GA4F”) does contravene Google’s user-facing privacy  
 23 representations, this Court ruled, Plaintiffs would have claims against Google for violation of the  
 24 CDAFA and the common law torts of intrusion upon seclusion and invasion of privacy. *Id.* at 14–  
 25 16.

26 In particular, Google makes available to users “a complex user-facing privacy apparatus” for  
 27 controlling various privacy-related aspects of the user experience. *Id.* at 2–4. One such tool is an  
 28

1 account setting (among others) called “Web & App Activity,” or WAA. The WAA button<sup>6</sup> “purports  
 2 to give consumers control over a defined subset of Google’s data-gathering efforts.” *Id.* at 3.  
 3 Specifically, it tells users that if they turn on the toggle, that will “let Google save” certain  
 4 information to “an individual’s ‘Google Account.’” *Id.* at 3. That set of data comprises “‘info about  
 5 [the individual’s] searches and other activity on Google sites, apps, and services,’ as well as ‘info  
 6 about [the individual’s] . . . activity on sites, apps, and devices that use Google services.’” *Id.* The  
 7 Court found particularly relevant in these disclosures two undefined terms—“Google services” and  
 8 “Google Account.” Depending on how a user interprets those terms, this Court held, a reasonable  
 9 user could potentially be misled by the description of the WAA button in light of how ~~GA for~~  
 10 ~~FirebaseGA4F~~ works. *Id.* at 8–10.

11 ~~GA for FirebaseGA4F~~ is an enterprise-facing product that app developers can use for free.  
 12 *Id.* at 4. When functioning as advertised, “GA for Firebase will automatically send various  
 13 interactions between the app and its users . . . to Google, which will then present a clean,  
 14 optimization-minded analysis of that data to the developer.” *Id.* at 4. To use ~~GA for~~  
 15 ~~FirebaseGA4F~~, app developers must agree to obtain consent for end users for the developer’s use  
 16 of ~~GA for FirebaseGA4F~~. *Id.* at 4–5 & n. 3 (discussing “GA for Firebase Materials,” a “suite of  
 17 agreements, policies, and resources” provided to developers in Google’s publicly-available online  
 18 “Help Center.”). As described by the Court, Plaintiffs allege that ~~GA for FirebaseGA4F~~  
 19 contravenes the WAA description as follows:

20 ~~plaintiffs~~ Plaintiffs allege Google’s capture and analysis of data via GA for Firebase,  
 21 on behalf of app developers who knowingly utilize that service, violates the WAA  
 22 Materials’ representations to individuals who have disabled the WAA feature.  
 23 Under this theory of liability, GA for Firebase—when running as marketed—  
 24 allows Google to collect information about an individual’s “activity on . . . apps . . .  
 25 that use Google services,” notwithstanding the WAA Materials’ statement that  
 26 “[t]o let Google save this information . . . Web & App Activity *must* be on.”

27  
 28  
 29  
 30  
 31  
 32  
 33  
 34  
 35  
 36  
 37  
 38  
 39  
 40  
 41  
 42  
 43  
 44  
 45  
 46  
 47  
 48  
 49  
 50  
 51  
 52  
 53  
 54  
 55  
 56  
 57  
 58  
 59  
 60  
 61  
 62  
 63  
 64  
 65  
 66  
 67  
 68  
 69  
 70  
 71  
 72  
 73  
 74  
 75  
 76  
 77  
 78  
 79  
 80  
 81  
 82  
 83  
 84  
 85  
 86  
 87  
 88  
 89  
 90  
 91  
 92  
 93  
 94  
 95  
 96  
 97  
 98  
 99  
 100  
 101  
 102  
 103  
 104  
 105  
 106  
 107  
 108  
 109  
 110  
 111  
 112  
 113  
 114  
 115  
 116  
 117  
 118  
 119  
 120  
 121  
 122  
 123  
 124  
 125  
 126  
 127  
 128  
 129  
 130  
 131  
 132  
 133  
 134  
 135  
 136  
 137  
 138  
 139  
 140  
 141  
 142  
 143  
 144  
 145  
 146  
 147  
 148  
 149  
 150  
 151  
 152  
 153  
 154  
 155  
 156  
 157  
 158  
 159  
 160  
 161  
 162  
 163  
 164  
 165  
 166  
 167  
 168  
 169  
 170  
 171  
 172  
 173  
 174  
 175  
 176  
 177  
 178  
 179  
 180  
 181  
 182  
 183  
 184  
 185  
 186  
 187  
 188  
 189  
 190  
 191  
 192  
 193  
 194  
 195  
 196  
 197  
 198  
 199  
 200  
 201  
 202  
 203  
 204  
 205  
 206  
 207  
 208  
 209  
 210  
 211  
 212  
 213  
 214  
 215  
 216  
 217  
 218  
 219  
 220  
 221  
 222  
 223  
 224  
 225  
 226  
 227  
 228  
 229  
 230  
 231  
 232  
 233  
 234  
 235  
 236  
 237  
 238  
 239  
 240  
 241  
 242  
 243  
 244  
 245  
 246  
 247  
 248  
 249  
 250  
 251  
 252  
 253  
 254  
 255  
 256  
 257  
 258  
 259  
 260  
 261  
 262  
 263  
 264  
 265  
 266  
 267  
 268  
 269  
 270  
 271  
 272  
 273  
 274  
 275  
 276  
 277  
 278  
 279  
 280  
 281  
 282  
 283  
 284  
 285  
 286  
 287  
 288  
 289  
 290  
 291  
 292  
 293  
 294  
 295  
 296  
 297  
 298  
 299  
 300  
 301  
 302  
 303  
 304  
 305  
 306  
 307  
 308  
 309  
 310  
 311  
 312  
 313  
 314  
 315  
 316  
 317  
 318  
 319  
 320  
 321  
 322  
 323  
 324  
 325  
 326  
 327  
 328  
 329  
 330  
 331  
 332  
 333  
 334  
 335  
 336  
 337  
 338  
 339  
 340  
 341  
 342  
 343  
 344  
 345  
 346  
 347  
 348  
 349  
 350  
 351  
 352  
 353  
 354  
 355  
 356  
 357  
 358  
 359  
 360  
 361  
 362  
 363  
 364  
 365  
 366  
 367  
 368  
 369  
 370  
 371  
 372  
 373  
 374  
 375  
 376  
 377  
 378  
 379  
 380  
 381  
 382  
 383  
 384  
 385  
 386  
 387  
 388  
 389  
 390  
 391  
 392  
 393  
 394  
 395  
 396  
 397  
 398  
 399  
 400  
 401  
 402  
 403  
 404  
 405  
 406  
 407  
 408  
 409  
 410  
 411  
 412  
 413  
 414  
 415  
 416  
 417  
 418  
 419  
 420  
 421  
 422  
 423  
 424  
 425  
 426  
 427  
 428  
 429  
 430  
 431  
 432  
 433  
 434  
 435  
 436  
 437  
 438  
 439  
 440  
 441  
 442  
 443  
 444  
 445  
 446  
 447  
 448  
 449  
 450  
 451  
 452  
 453  
 454  
 455  
 456  
 457  
 458  
 459  
 460  
 461  
 462  
 463  
 464  
 465  
 466  
 467  
 468  
 469  
 470  
 471  
 472  
 473  
 474  
 475  
 476  
 477  
 478  
 479  
 480  
 481  
 482  
 483  
 484  
 485  
 486  
 487  
 488  
 489  
 490  
 491  
 492  
 493  
 494  
 495  
 496  
 497  
 498  
 499  
 500  
 501  
 502  
 503  
 504  
 505  
 506  
 507  
 508  
 509  
 510  
 511  
 512  
 513  
 514  
 515  
 516  
 517  
 518  
 519  
 520  
 521  
 522  
 523  
 524  
 525  
 526  
 527  
 528  
 529  
 530  
 531  
 532  
 533  
 534  
 535  
 536  
 537  
 538  
 539  
 540  
 541  
 542  
 543  
 544  
 545  
 546  
 547  
 548  
 549  
 550  
 551  
 552  
 553  
 554  
 555  
 556  
 557  
 558  
 559  
 560  
 561  
 562  
 563  
 564  
 565  
 566  
 567  
 568  
 569  
 570  
 571  
 572  
 573  
 574  
 575  
 576  
 577  
 578  
 579  
 580  
 581  
 582  
 583  
 584  
 585  
 586  
 587  
 588  
 589  
 590  
 591  
 592  
 593  
 594  
 595  
 596  
 597  
 598  
 599  
 600  
 601  
 602  
 603  
 604  
 605  
 606  
 607  
 608  
 609  
 610  
 611  
 612  
 613  
 614  
 615  
 616  
 617  
 618  
 619  
 620  
 621  
 622  
 623  
 624  
 625  
 626  
 627  
 628  
 629  
 630  
 631  
 632  
 633  
 634  
 635  
 636  
 637  
 638  
 639  
 640  
 641  
 642  
 643  
 644  
 645  
 646  
 647  
 648  
 649  
 650  
 651  
 652  
 653  
 654  
 655  
 656  
 657  
 658  
 659  
 660  
 661  
 662  
 663  
 664  
 665  
 666  
 667  
 668  
 669  
 670  
 671  
 672  
 673  
 674  
 675  
 676  
 677  
 678  
 679  
 680  
 681  
 682  
 683  
 684  
 685  
 686  
 687  
 688  
 689  
 690  
 691  
 692  
 693  
 694  
 695  
 696  
 697  
 698  
 699  
 700  
 701  
 702  
 703  
 704  
 705  
 706  
 707  
 708  
 709  
 710  
 711  
 712  
 713  
 714  
 715  
 716  
 717  
 718  
 719  
 720  
 721  
 722  
 723  
 724  
 725  
 726  
 727  
 728  
 729  
 730  
 731  
 732  
 733  
 734  
 735  
 736  
 737  
 738  
 739  
 740  
 741  
 742  
 743  
 744  
 745  
 746  
 747  
 748  
 749  
 750  
 751  
 752  
 753  
 754  
 755  
 756  
 757  
 758  
 759  
 760  
 761  
 762  
 763  
 764  
 765  
 766  
 767  
 768  
 769  
 770  
 771  
 772  
 773  
 774  
 775  
 776  
 777  
 778  
 779  
 780  
 781  
 782  
 783  
 784  
 785  
 786  
 787  
 788  
 789  
 790  
 791  
 792  
 793  
 794  
 795  
 796  
 797  
 798  
 799  
 800  
 801  
 802  
 803  
 804  
 805  
 806  
 807  
 808  
 809  
 810  
 811  
 812  
 813  
 814  
 815  
 816  
 817  
 818  
 819  
 820  
 821  
 822  
 823  
 824  
 825  
 826  
 827  
 828  
 829  
 830  
 831  
 832  
 833  
 834  
 835  
 836  
 837  
 838  
 839  
 840  
 841  
 842  
 843  
 844  
 845  
 846  
 847  
 848  
 849  
 850  
 851  
 852  
 853  
 854  
 855  
 856  
 857  
 858  
 859  
 860  
 861  
 862  
 863  
 864  
 865  
 866  
 867  
 868  
 869  
 870  
 871  
 872  
 873  
 874  
 875  
 876  
 877  
 878  
 879  
 880  
 881  
 882  
 883  
 884  
 885  
 886  
 887  
 888  
 889  
 890  
 891  
 892  
 893  
 894  
 895  
 896  
 897  
 898  
 899  
 900  
 901  
 902  
 903  
 904  
 905  
 906  
 907  
 908  
 909  
 910  
 911  
 912  
 913  
 914  
 915  
 916  
 917  
 918  
 919  
 920  
 921  
 922  
 923  
 924  
 925  
 926  
 927  
 928  
 929  
 930  
 931  
 932  
 933  
 934  
 935  
 936  
 937  
 938  
 939  
 940  
 941  
 942  
 943  
 944  
 945  
 946  
 947  
 948  
 949  
 950  
 951  
 952  
 953  
 954  
 955  
 956  
 957  
 958  
 959  
 960  
 961  
 962  
 963  
 964  
 965  
 966  
 967  
 968  
 969  
 970  
 971  
 972  
 973  
 974  
 975  
 976  
 977  
 978  
 979  
 980  
 981  
 982  
 983  
 984  
 985  
 986  
 987  
 988  
 989  
 990  
 991  
 992  
 993  
 994  
 995  
 996  
 997  
 998  
 999  
 1000  
 1001  
 1002  
 1003  
 1004  
 1005  
 1006  
 1007  
 1008  
 1009  
 1010  
 1011  
 1012  
 1013  
 1014  
 1015  
 1016  
 1017  
 1018  
 1019  
 1020  
 1021  
 1022  
 1023  
 1024  
 1025  
 1026  
 1027  
 1028  
 1029  
 1030  
 1031  
 1032  
 1033  
 1034  
 1035  
 1036  
 1037  
 1038  
 1039  
 1040  
 1041  
 1042  
 1043  
 1044  
 1045  
 1046  
 1047  
 1048  
 1049  
 1050  
 1051  
 1052  
 1053  
 1054  
 1055  
 1056  
 1057  
 1058  
 1059  
 1060  
 1061  
 1062  
 1063  
 1064  
 1065  
 1066  
 1067  
 1068  
 1069  
 1070  
 1071  
 1072  
 1073  
 1074  
 1075  
 1076  
 1077  
 1078  
 1079  
 1080  
 1081  
 1082  
 1083  
 1084  
 1085  
 1086  
 1087  
 1088  
 1089  
 1090  
 1091  
 1092  
 1093  
 1094  
 1095  
 1096  
 1097  
 1098  
 1099  
 1100  
 1101  
 1102  
 1103  
 1104  
 1105  
 1106  
 1107  
 1108  
 1109  
 1110  
 1111  
 1112  
 1113  
 1114  
 1115  
 1116  
 1117  
 1118  
 1119  
 1120  
 1121  
 1122  
 1123  
 1124  
 1125  
 1126  
 1127  
 1128  
 1129  
 1130  
 1131  
 1132  
 1133  
 1134  
 1135  
 1136  
 1137  
 1138  
 1139  
 1140  
 1141  
 1142  
 1143  
 1144  
 1145  
 1146  
 1147  
 1148  
 1149  
 1150  
 1151  
 1152  
 1153  
 1154  
 1155  
 1156  
 1157  
 1158  
 1159  
 1160  
 1161  
 1162  
 1163  
 1164  
 1165  
 1166  
 1167  
 1168  
 1169  
 1170  
 1171  
 1172  
 1173  
 1174  
 1175  
 1176  
 1177  
 1178  
 1179  
 1180  
 1181  
 1182  
 1183  
 1184  
 1185  
 1186  
 1187  
 1188  
 1189  
 1190  
 1191  
 1192  
 1193  
 1194  
 1195  
 1196  
 1197  
 1198  
 1199  
 1200  
 1201  
 1202  
 1203  
 1204  
 1205  
 1206  
 1207  
 1208  
 1209  
 1210  
 1211  
 1212  
 1213  
 1214  
 1215  
 1216  
 1217  
 1218  
 1219  
 1220  
 1221  
 1222  
 1223  
 1224  
 1225  
 1226  
 1227  
 1228  
 1229  
 1230  
 1231  
 1232  
 1233  
 1234  
 1235  
 1236  
 1237  
 1238  
 1239  
 12310  
 12311  
 12312  
 12313  
 12314  
 12315  
 12316  
 12317  
 12318  
 12319  
 12320  
 12321  
 12322  
 12323  
 12324  
 12325  
 12326  
 12327  
 12328  
 12329  
 12330  
 12331  
 12332  
 12333  
 12334  
 12335  
 12336  
 12337  
 12338  
 12339  
 12340  
 12341  
 12342  
 12343  
 12344  
 12345  
 12346  
 12347  
 12348  
 12349  
 12350  
 12351  
 12352  
 12353  
 12354  
 12355  
 12356  
 12357  
 12358  
 12359  
 12360  
 12361  
 12362  
 12363  
 12364  
 12365  
 12366  
 12367  
 12368  
 12369  
 12370  
 12371  
 12372  
 12373  
 12374  
 12375  
 12376  
 12377  
 12378  
 12379  
 12380  
 12381  
 12382  
 12383  
 12384  
 12385  
 12386  
 12387  
 12388  
 12389  
 12390  
 12391  
 12392  
 12393  
 12394  
 12395  
 12396  
 12397  
 12398  
 12399  
 123100  
 123101  
 123102  
 123103  
 123104  
 123105  
 123106  
 123107  
 123108  
 123109  
 123110  
 123111  
 123112  
 123113  
 123114  
 123115  
 123116  
 123117  
 123118  
 123119  
 123120  
 123121  
 123122  
 123123  
 123124  
 123125  
 123126  
 123127  
 123128  
 123129  
 123130  
 123131  
 123132  
 123133  
 123134  
 123135  
 123136  
 123137  
 123138  
 123139  
 123140  
 123141  
 123142  
 123143  
 123144  
 123145  
 123146  
 123147  
 123148  
 123149  
 123150  
 123151  
 123152  
 123153  
 123154  
 123155  
 123156  
 123157  
 123158  
 123159  
 123160  
 123161  
 123162  
 123163  
 123164  
 123165  
 123166  
 123167  
 123168  
 123169  
 123170  
 123171  
 123172  
 123173  
 123174  
 123175  
 123176  
 123177  
 123178  
 123179  
 123180  
 123181  
 123182  
 123183  
 123184  
 123185  
 123186  
 123187  
 123188  
 123189  
 123190  
 123191  
 123192  
 123193  
 123194  
 123195  
 123196  
 123197  
 123198

1       *Id.* at 6 (emphasis in original). Further, this Court ruled that the phrase “Google Account” was  
 2 sufficiently ambiguous that a user could reasonably believe that turning WAA off would prevent  
 3 Google from saving ~~GA for Firebase~~<sup>GA4F</sup> data linked to that user’s “e-mail address,” or that  
 4 “monitors” that user’s activity across the web, or that personalizes that user’s experiences across  
 5 Google services. *Id.* at 8–9. As a result, Plaintiffs stated a claim for violation of the CDAFA because  
 6 Google’s data collection was allegedly “without permission,” and for invasion of privacy because  
 7 the question of whether the user consented and whether the collection was highly offensive were  
 8 inappropriate for resolution on the pleadings. *Id.* at 14–16. Those are the claims that have survived  
 9 through later motions to dismiss. As of today, four named Plaintiffs remain: Sal Cataldo, Susan  
 10 Lynn Harvey, Anibal Rodriguez, and Julian Santiago. See 4AC, ECF No. 289.

### 11           C. The ~~Discovery Period~~<sup>discovery period</sup>

12       In total, the parties engaged in 48 months of fact discovery and 5 months of expert discovery,  
 13 comprising 211,186 pages of produced documents, 1,113 pages of expert reports, 2,201 pages of  
 14 expert depositions, and 4,239 pages of witness deposition transcripts. Santacana Decl. ¶¶ 3. When  
 15 necessary, the parties appealed to Judge Tse to resolve discovery disputes. In all, Judge Tse issued  
 16 21 Orders resolving 25 discovery disputes. Santacana Decl. ¶ 3. At the close of fact discovery,  
 17 Plaintiffs requested a two-month extension of the discovery period on the grounds that Google had  
 18 engaged in alleged discovery misconduct. ECF No. 279. This Court denied that motion in December  
 19 2022. ECF No. 282.

### 20           D. The Court’s Order ~~Granting~~<sup>granting</sup> Class Certification

21       Following expert discovery, Plaintiffs moved for class certification, ECF No. 315, and  
 22 Google opposed, ECF No. 329. The Court issued its Order granting class certification on January  
 23 3, 2024, ECF No. 352, certifying two classes of plaintiffs comprising individuals who turned off  
 24 (s)WAA and used Firebase— or Google Mobile Ads—enabled apps.

25       In order to secure class certification, Plaintiffs disclaimed a variety of arguments and pressed  
 26 to the Court the theory that the mere collection of app activity data, absent any use by Google, and  
 27 even if it is made pseudonymous or anonymous, nevertheless contravened Google’s description of  
 28 the WAA button, and that the difference could be used to hold Google liable class-wide.

1 Accepting Plaintiffs' arguments, the Court granted class certification and rejected Google's  
 2 arguments concerning individualized issues. *Id.* In particular, the Court reasoned that Google's  
 3 consent defense could be decided class-wide because "Google's representations about the WAA  
 4 feature, unambiguous and persistent by its own admission, outweigh these individual questions  
 5 about *where* class members learned about the WAA feature." *Id.* at 15–16 (emphasis in original).  
 6 Further, the Court held that "the relevant 'conduct' showing a lack of consent is the users' decisions  
 7 affirmatively to switch off the WAA and sWAA buttons," which this Court held constituted a  
 8 "common act representing their privacy choices, based on Google's own ubiquitous  
 9 representations." *Id.* at 9–10. In addition, the Court held that "even if Google is right, and the 'vast  
 10 majority' of class members' data was only exposed to record-keeping 'not tied to a person's identity  
 11 or used by Google for any purpose other than to perform accounting for the apps that generated the  
 12 data or advertising in the first place,' Opp. at 16, then surely that can be proven by common evidence  
 13 of Google's record-keeping practices." *Id.* at 12.

### 14 III. STATEMENT OF FACTS

15 The following statement of facts is undisputed. To the extent Plaintiffs dispute any fact  
 16 below, Google respectfully submits that no evidence in the record supports such a position.

#### 17 A. Plaintiffs concede that Google does not personalize advertising with (s)WAA- 18 off data; the certified theory of liability challenges basic, pseudonymous 19 record-keeping.

20 ~~GA for Firebase~~<sup>GA4F</sup> is "an app measurement solution" used by mobile app developers for  
 21 "insight on app usage and user engagement." *See Google Analytics*, Firebase, ECF No. 324-1(Appx.  
 22 A-8).<sup>7</sup> Using ~~GA for Firebase~~<sup>GA4F</sup>, app developers can measure various "events," or specific types  
 23 of user interactions with their apps.<sup>8</sup> *See* Expert Report of Jonathan Hochman ("Hochman Rpt.",)  
 24 ECF No. 361-58, ¶¶ 89–91 (Appx. A-11); Interrog. Set One Resps., ECF No. 364-1, at 4:20–

---

25  
 26 <sup>7</sup> *See also* Interrog. Set One Resps., ECF No. 364-1, at 5:8–21; "App Attribution in GAA," ECF No. 364-2,  
 27 at -515 (Appx. A-14) (Unsealed Version at Appx B-4); Hochman Rpt., ECF No. 361-58, at ¶ 62 (Appx.  
 A-11).

28 <sup>8</sup> Default events include, for example, the first opening of an app, or when a user clicks on a certain part of  
 the app. ECF No. 361-58, ¶ 94 & n. 84; Interrog. Set One Resps., ECF No. 364-1, at 4:20–5:21 (Appx. A-  
 13); *see also* ECF No. 324-4 (excerpting "[GA4] Automatically collected events") (Appx. A-9).

1 5:6 (Appx. A-13). As a service provider, Google accepts bundles of event data from app developers'  
 2 apps and stores and analyzes them for those developers regardless of a user's (s)WAA setting. ECF  
 3 No. 364-1, at 10:15–11:5, 28:4–28:23 (Appx. A-13).

4 As long as they comply with Google's terms of use, app developers can also customize their  
 5 usage of GA4F. *See* Historic GA4F Terms of Service (Appx. A-2); ECF No. 65, at 5–6 (Appx. A-  
 6 1–).<sup>9</sup> Per Google's terms, apps must disclose and obtain consent from end users to use the SDK.  
 7 *Id.*

8 In their complaints, Plaintiffs alleged that Google saves WAA-off data to marketing profiles  
 9 and uses them to personalize advertising, that Google "includes in its user profiles" data "secretly  
 10 transmitted to Google" by "tracking and advertising code," *i.e.* GA4F. And they claimed that by  
 11 "including this data in its user profiles, Google increases the user profiles' value" and "allows  
 12 Google to more effectively target advertisements to these users"; and that "this [sWAA-off] data is  
 13 combined by Google into a user profile with all the other detailed, user-specific data Google collects  
 14 on individuals and their devices," which "Google then uses [] to help generate billions of dollars in  
 15 advertising revenues without users' consent." ECF No. 1, ¶¶ 37–39, 141–143, 146.

16 Over the course of this lawsuit, Plaintiffs' narrative shifted; they and their experts now  
 17 concede these allegations were false.<sup>10</sup> Indeed, Google's verified interrogatory response, served  
 18 nearly three years ago, made it clear: **Google does not save WAA-off data to any Google user's**  
**marketing profile, and does not use WAA-off data for personalized advertising, either in**  
**connection with a user's true identity or in connection with a user's pseudonymous identity.**<sup>11</sup>  
 21 Interrog. Set One Resp., ECF No. 364-1, at 7:7–14 (Appx. A-13). Plaintiffs no longer contend, as  
 22 they once did, that Google secretly collects (s)WAA-off data to create profiles for personalized

---

23 <sup>9</sup> *See also* Additional Historic GA4F Terms of Service, (Appx A-2).

24 <sup>10</sup> *See* Dep. Tr. of Jonathan Hochman ("Hochman Tr."), ECF No. 364-19, at 194:18–24 (Appx. A-20) (Q.  
 25 "[Y]ou're not disputing in this case that Google will not personalize ads . . . with sWAA-off Google analytics  
 26 for Firebase data?" A. "That's correct."). *See also* Dep. Transcript of Michael Lasinski ("Lasinski Tr."), ECF  
 27 No. 364-17, at 79:16–18 (Appx. A-19) ("[M]y understanding is that Google has represented that sWAA-off  
 users do not receive personalized ads."); *id.* at 81:6–9 (Q. "So for neither scenario did you assume that  
 sWAA-off users were receiving personalized ads that relied on sWAA-off data?" A. "Correct.").

28 <sup>11</sup> *See also* Google's Resps. to Plaintiffs' Interrog., Set Six, ECF No. 364-22, at 8:21–10:9 (Appx. A-22);  
 Interrog. Set One Resp., ECF No. 364-1, at 23:15–25:23 (Appx. A-13); Interrog. No. 18 Resps., ECF No.  
 364-8, at 5–6; Dep. Tr. of Belinda Langner ("Langner Tr."), ECF No. 364-7, at 78:2–7 (Appx. A-18).

1 advertising. Instead, Plaintiffs argue that Google uses (s)WAA-off data for basic record-keeping.  
 2 And, in their Motion for Class Certification, Plaintiffs' Plaintiffs paradoxically argued that Google  
 3 conceals its basic record-keeping with (s)WAA-off data “by turning off ‘personalized’ ads that  
 4 could tip [users] off to Google’s continued tracking.” Class Cert. Mot., ECF No. 361-1, at 2. That  
 5 is, for most of the pendency of this case, Plaintiffs maintained that Google’s alleged personalization  
 6 of advertising with (s)WAA-off data was deceptive; now they argue that Google’s decision not to  
 7 personalize advertising with (s)WAA-off data is deceptive.

8 Specifically, the Motion argued that Google contravenes its representations because, even  
 9 when a user’s (s)WAA is turned off, Google will still (1) log the fact that it has served an ad  
 10 alongside a device identifier for accounting purposes, and (2) attribute conversion events to those  
 11 ad serving records. *See* ECF No. 361-1, at 14. Plaintiffs’ damages theory relied upon to obtain class  
 12 certification focuses on this use of (s)WAA-off data, positing that (1) “[i]f Google did not collect  
 13 and save ad requests, it could not serve ads. And without data regarding both ad requests and the  
 14 ads that Google served, Google would lack the records it needs to charge advertisers for its services”  
 15 and (2) “Google also uses this ads data to track conversions; if it lacked data regarding a user’s  
 16 interaction with an ad, it would be unable to determine whether that interaction is related to any  
 17 later behavior.” Hochman Rpt., ECF No. 361-58, ¶ 122 (Appx. A-11).<sup>12</sup> The logging of the (s)WAA-  
 18 off record of ad service or analytics conversion events is, in Plaintiffs’ view, an indispensable link  
 19 in a long chain that ends in advertisers paying for advertising.<sup>13</sup> Thus, Plaintiffs claim, Google  
 20 should be disgorged of *all* profit made from serving any ads to (s)WAA-off users on mobile apps,

21

---

22 <sup>12</sup> See *also id.* ¶ 271 (“[B]ut for Google’s collection of WAA-off or sWAA-off data, Google would not be  
 23 able to serve advertisements to those users and then charge the advertisers because Google would lack the  
 24 necessary data records to back up their advertising charges.”); Lasinski Tr., ECF No. 364-17, 113:1-3,  
 25 113:20-23 (Appx. A-19) (“The advertiser would pay less to Google because Google did not – would not  
 26 serve an ad in those cases. . . . [T]hey would pay them less because those ads that are currently being shown  
 to sWAA-off users would not be shown to sWAA-off users.”); *id.* at 137:8-14 (“My understanding is, based  
 on input given to me, is that Google would not be able to serve an ad in those situations. Whether or not you  
 want to call it an ad blocker, I’ve never called it that, but Google would not be able to serve an ad in those  
 situations.”).

27 <sup>13</sup> Plaintiffs have also complained that Google uses the (s)WAA-off data to improve Google’s products and  
 28 services (Class Cert. Mot., ECF No. 361-1, at 3), and engage in fraud and spam detection (Hochman Tr.,  
 ECF No. 364-19, at 204:25-209:10 (Appx. A-20)), but they do not assign these uses any value in their  
 damages models and do not rely on these arguments to demonstrate class-wide injury.

1 because to perform the serving of the ad, Google had to exchange information with the mobile app  
 2 where the ad was served, and keep a record that it served it. *Id.* at ¶ 271; Lasinski Tr., ECF No. 364-  
 3 17, at 129:12–18 (Appx. A-19).

4 At a technical level, the practice Plaintiffs complain of as profit-making is the use of  
 5 (s)WAA-off records by Google to perform “attribution”<sup>14</sup> for advertisers. *See* Hochman Rpt., ECF  
 6 No. 361-58, ¶¶ 279–296 (describing generally “Attribution/Conversion Tracking”); Appendix E to  
 7 Hochman Report: Ad Campaigns and Conversion Tracking/Modeling (Appx. A-11); ECF No. 361-  
 8 59, ¶¶ 12–26 (Appx. A-12) (Unredacted at Appx. B-1). Attribution can be performed in a number  
 9 of ways. The specific technique Plaintiffs complain of works as follows:

- 10 1. **At Time 1**, an ad for the New York Times (NYT) app appears in the Nike app, which  
 11 uses the Google Mobile Ads SDK (AdMob) to serve ads. An unidentified user clicks on  
 12 it, causing the SDK to **log that the user’s device ID clicked on that ad**.
- 13 2. Then, the user installs and opens the advertised NYT app. The NYT app uses the Firebase  
 14 SDK and GA4F. As a result, **at Time 2**, the NYT app uses GA4F to **log that the user’s  
 15 device ID triggered the “first\_open” analytics event**.
- 16 3. Google’s ad system connects the dots on the back end: the same device ID that clicked on  
 17 the ad at Time 1 triggered the “first\_open” event at Time 2. If the two times are within a  
 18 time period set by the advertiser (for example, 7 days), Google reports to the app  
 19 developer/advertiser that **a conversion has occurred**. Over time, the app  
 20 developer/advertiser receives aggregate reporting on the conversions they’ve achieved.

21 Measuring conversions varies from app to app because app developers can choose to rely  
 22 on Google’s default conversion events, like “first\_open,” or they can create their own custom  
 23 conversion events.<sup>15</sup> Hochman Rpt., ECF No. 361-58 at ¶ 94 & n.84 (Appx A-11); *see also* “Log  
 24 Events,” Google Analytics (Appx. A-23). Plaintiffs have never offered any explanation for how this  
 25 basic record-keeping activity harms users.

26 The conversion and ads logs in question are streamlined to contain just the critical pieces of  
 27 information—which device triggered the event, the name of the event, which app sent Google the  
 28 information, and other similar pieces of information. *See* Expert Report of John Black (“Black

---

<sup>14</sup> *See generally* “Attribution (Marketing),” Wikipedia, The Free Encyclopedia (last modified February 10, 2024), [https://en.wikipedia.org/wiki/Attribution\\_\(marketing\)](https://en.wikipedia.org/wiki/Attribution_(marketing)).

<sup>15</sup> *See generally* “[GA4] Create or Modify Conversion Events,” Google Analytics Help, accessed March 21, 2024, <https://support.google.com/analytics/answer/12844695?hl=en>

1 Rpt.”), ECF No. 364-20, ¶ 92 (Appx. A-21); *see also* Hochman Rpt, App’x E, ECF No. 361-59  
 2 (Appx. A-12). So, for example, while a conversion event could be called “in\_app\_purchase,” and it  
 3 could contain for the app developer pseudonymous information about what the device purchased,  
 4 for Google’s attribution purposes, it is just the fact that the event occurred that is logged and later  
 5 used to connect an ad click at Time 1 with a purchase at Time 2. *See* Black Rpt., ECF No. 364-20,  
 6 ¶ 92 (Appx. A-21); *see also* Hochman Rpt., ECF No. 361-58, ¶¶ 122–123.

7 This accounting function is the basis for the certified theory of liability.

8           **B. Google represented that the WAA button controlled whether data would be**  
 9           **“saved to your Google Account,” i.e., “associated with your personal**  
 10          **information.”**

11          The theory of liability certified by this Court centers around Google’s representation that  
 12 turning WAA<sup>16</sup> on would enable Google to “save” a user’s activity data “in your Google Account.”  
 13 4AC, ECF No. 289, at 27. Plaintiffs reason that the opposite should hold true as well; that is, if a  
 14 user turns off WAA, that should disable Google from saving a user’s activity data to that user’s  
 15 Google Account. As discussed below, that is exactly how WAA works.

16          Part of Plaintiffs’ theory of liability rests on the term “**your Google Account**.” This is a  
 17 defined term. *See* Privacy Policies, ECF No. 323-1, at 52 (Appx. A-7). The Privacy Policy ((“PP”))  
 18 has, since the start of the class period, explained that Google treats information “associated with  
 19 your Google Account” as “personal information,” which is distinct from “non-personally  
 20 identifiable information.” Privacy Policies, ECF No. 323-1, at 5, 52 (Appx. A-7). First, the PP  
 21 explained that “Information we collect when you are signed in to Google, in addition to information  
 22 we obtain about you from partners, may be associated with your Google Account. **When**  
 23 **information is associated with your Google Account, we treat it as personal information.** For  
 24 more information about how you can access, manage or delete information that is associated with  
 25 your Google Account, visit the Transparency and choice section of this policy.” *Id.* at 5; *see also id.*

---

26  
 27  
 28         <sup>16</sup> The (s)WAA control can only be enabled if WAA is also enabled.

1 at 6–7, 11 (“Depending on your account settings, your activity on other sites and apps may be  
 2 **associated with your personal information**” and Google “may share non-personally identifiable  
 3 information publicly and with our partners.”<sup>17</sup>).<sup>18</sup>

4 Throughout the class period, the PP directed users to a “Key Terms” section if there were  
 5 phrases they did not understand: “We’ve tried to keep it as simple as possible, but if you’re not  
 6 familiar with terms like cookies, IP addresses, pixel tags and browsers, then read about these key  
 7 terms first.” *Id.* at 1. The Key Terms section in turn defined throughout the class period the phrases  
 8 “Google Account,” “personal information,” and “non-personally identifiable information.” *Id.* at  
 9 52. **“Google Account”** was defined as the Account a user signs up for by “providing us with some  
 10 personal information” which can be used “to authenticate you when you access Google services;  
 11 **“personal information”** was defined as information “which personally identifies you, such as your  
 12 name, email address or billing information, or other data which can be reasonably linked to such  
 13 information by Google, **such as information we associate with your Google account.**<sup>19</sup>; and  
 14 **“non-personally identifiable information”** was defined as “information that is recorded about  
 15 users so that it no longer reflects or references an individually identifiable user.” *Id.* No section of  
 16 the PP or the WAA page itself suggests to users that there is an account control to disable Google’s  
 17 collection or use of “non-personally identifiable information.”<sup>20</sup>

18           **C. Google’s disclosures uniformly and unambiguously explained that it could use  
 19           non-personal information for basic record-keeping.**

20 Google discloses its uses of analytics and ads data in many contexts, and explains the  
 21 difference between run-of-the-mill record-keeping using non-personal information and personalized  
 22 advertising using personal information associated with a Google Account.  
 23

24

---

25 <sup>17</sup> Further, since at least 2016, in a section linked from the [PolicyPP](#) called “How Google uses data when  
 26 you use our partners’ sites or apps,” Google explained that “apps that partner with Google can send us  
 27 information such as the name of the app and an identifier that helps us to determine which ads we’ve served  
 28 to other apps on your device. If you are signed in to your Google Account, and depending on your Account  
 settings, we may add that information to your Account, and treat it as personal information.” ECF No. 323-  
 1, at 54 (excerpting “How Google uses data when you use our partners’ sites or apps” from Google’s Privacy  
 & Terms dated June 28, 2016 PP) (Appx. A-7). The account setting referenced here is, once again, the WAA  
 setting.

1       First, in its Privacy Policy, Google explained throughout the class period that Google uses  
 2 “cookies or similar technologies to identify your browser or device” and to “collect and store  
 3 information when you interact with services we offer to our partners, such as advertising services  
 4 or Google features that may appear on other sites,” including “Google Analytics.” ECF No. 323-1,  
 5 at 4-5 (Appx. A-7). Further, the PP explained that analytics helps app owners “analyze the traffic  
 6 to their [] apps” and “[w]hen used in conjunction with our advertising services . . . Google Analytics  
 7 information is linked, by the Google Analytics customer or by Google, using Google technology,  
 8 with information about visits to multiple sites.” *Id.* at 5.

9       The PP also explained that “we [Google] regularly **report to advertisers on whether we**  
 10 **served their ad to a page and whether that ad was likely to be seen.**” *Id.* at 23. Google’s Privacy  
 11 Portal also hosts a “How Ads Work” page, which again explained: “We give advertisers data about  
 12 their ads’ performance, but we do so without revealing any of your personal information.” *Id.* at 29.  
 13 Starting in March 2018, Google maintained a PP “Technologies” page, a corollary to the earlier  
 14 “How Ads Work” page; that page again explained: “We store a record of the ads we serve in our  
 15 logs”; “We anonymize this log data by removing part of the IP address (after 9 months) and cookie  
 16 information (after 18 months)”; and “You can use Ads Settings to manage the Google ads you see  
 17 and opt out of Ads Personalization,” but “[e]ven if you **opt out of Ads Personalization, you may**  
 18 **still see ads** based on factors such as your general location derived from your IP address, your  
 19 browser type, and your search terms.” *Id.* at 49.

20       Indeed, Plaintiff Sal Cataldo understood that (s)WAA was not an ad blocker and that while  
 21 he could control ads personalization, he could not use (s)WAA or the ads personalization button to  
 22 prevent Google from serving ads at all. Dep. Transcript of Sal Cataldo (“Cataldo Tr.”), ECF No.  
 23 364-6, at 152:18-153:18 (Appx. A-17).

24       Plaintiffs have argued that the (s)WAA control should function as an ad blocker, and prevent  
 25 Google even from keeping basic record-keeping of the ads it serves on behalf of third party  
 26 advertisers. But there is no textual basis for this argument.

27       Throughout the class period, the PP explained that users can “[r]eview and update your  
 28 Google activity controls to decide what types of data, such as videos you’ve watched on YouTube

1 or past searches, you would like **saved with your account** when you use Google services.” ECF  
 2 No. 323-1, at 7 (Appx. A-7). The text of the WAA control explains: “The data **saved in your account**  
 3 helps give you more **personalized** experiences across all Google services. Choose which settings  
 4 will save data **in your Google Account.**” 4AC, ECF No. 289, at 27 (emphasis added).

5 Google repeatedly explained to users that they could affect the advertising Google serves to  
 6 them via the “Ad Settings” button, **not** the WAA toggle. The PP and related disclosures made clear  
 7 that turning off the personalization setting would not prevent Google from serving ads, only make  
 8 the ads less relevant. ECF No. 323-1, at 48–50 (Appx. A-7). In other words, Google disclosed that  
 9 it would still perform its role as record-keeper for advertisers, and it would still serve ads, regardless  
 10 of a user’s Google Account Ad or WAA settings (and never represented that activity controls like  
 11 WAA would have anything to do to the contrary).

12       **D. Google never “saves to a user’s Google Account,” i.e., personally identifies,  
 13 (s)WAA-off Analytics or Ads data.**

14       The WAA button says it can be used to give Google permission to save activity data to a  
 15 user’s Google Account. The button does exactly what it says it will do. When WAA is off, Google  
 16 **never** saves activity data to a user’s Google account. *See* Interrog. Set 4One Resp., ECF No. 364-  
 17 1, at 11:19–13:17 (Appx. A-13); Interrog. Set 7Seven Resp., ECF No. 364-8, at 6:16–7:26;  
 18 Hochman Rpt., ECF No. 361-58, at ¶ 205 & n.136 (Appx. A-11); Langner Tr., ECF No. 364-7, at  
 19 78:2–78:7 (Appx. A-18).

20       If the user’s (s)WAA toggle—the toggle that applies to data from third-party apps—is set to  
 21 “off,” these data are **never** used by Google to identify users; they are processed and analyzed for the  
 22 benefit of the app developer who generated the data, so they can better understand their own  
 23 interactions with their own users and the success of their own advertising. Interrog. No. 1  
 24 Resp., ECF No. 364-1, at 16:19–17:5, 28:4–29:7 (Appx. A-13). Further, (s)WAA-off data is  
 25 treated by Google strictly as pseudonymous data. *Id.*; *see also* Dep. Transcript of Steve Ganem  
 26 (“Ganem Tr.”) ECF No. 364-3, at 44:16–19 (Appx. A-15). Google logs analytics and ads data  
 27 alongside a randomly generated pseudonymous identifier (a device ID like ADID or IDFA on iOS)  
 28 that is never mapped to the identity of the Google Account that was using the device. Interrog. No.,

1 Resp., ECF No. 364-1, at 12:7–13:2 (Appx. A-13). Google never unmasks pseudonymous identifiers, and takes steps to ensure these pseudonyms are never re-unified to a user’s identity. *Id.* at 8:2–9, 13:3–14:2, 23:15–25:23, 26:11–28:2; App’x X4 to Black Rpt., (sampling Google’s “Anti-Fingerprinting” and User Data Access Policies) (Appx. A-16). The only circumstance in which Google saves *any* activity data to a user’s Google account is when Google has first ensured the user has provided all required consents, including that (s)WAA is set to “on.” Interrog. No. 1 Resp., ECF No. 364-1, at 23:15–26:9 (Appx. A-13)

Plaintiffs do not contest any of this; indeed, when asked about this practice, Plaintiffs' technical expert conceded that Google "has the best intentions here" to keep pseudonymous and identifiable data separate, but complains that "maybe Google is nice today but they become evil in the future" and decides to re-unify data for a government or for profit.<sup>18</sup> Hochman Tr., ECF No. 364-19, at 364:18–365:5 (Appx. A-20).

E. Google has erected technical barriers to the joining of (s)WAA-off data with GAIA-keyed data.

Google takes significant steps to ensure that (s)WAA-off data are not re-associated with the user whose device generated the data. These steps vary from simple isolation of access to critical pieces of information to advanced cryptographic techniques that make it a practical impossibility for anyone at Google or anyone else to be able to rejoin pseudonymous data to a user's identity.

First, when Google’s servers perform a consent check to determine a user’s (s)WAA setting, the device IDs are encrypted, and the server checking the user’s consent status does not also receive the analytics data. See Interrog. No. 1 Resp., ECF No. 364-1, at 23:15–25:6, 26:11–28:2 (Appx. A-13). As a result, the physical machine that receives the encrypted device ID from user devices isn’t able to decrypt it, and the physical machine that decrypts the device ID doesn’t receive the measurement data. *Id.*

When a consent check returns a (s)WAA-off result, analytics data are logged to

<sup>18</sup> Even if there is a potential for rare instances of violation of Google's terms of service by app developers, that is *not* the basis of any certified theory of liability in this case, as any such idiosyncrasy could not be said to be uniform across the class, nor could Google be held liable for it, since causation would in that case depend on a third party's conduct.

1 “pseudonymous space.” *Id.* at 23:27–24:7, 25:7–8. These logs do not contain identifying  
 2 information in them. For example, they do not contain GAIA IDs, which correspond to a user’s  
 3 Google Account identifier. *Id.* at 25:25–26:9. Likewise, GAIA-keyed logs in “GAIA space” at  
 4 Google do not contain the identifiers in pseudonymous logs, such as device ID or unencrypted  
 5 app\_instance\_id. *Id.* Further, for those pieces of information that overlap between the GAIA log and  
 6 the pseudonymous log, they are encrypted differently and the decryption keys are thrown away after  
 7 six days, making it impossible to match up fields in one log to the other. *Id.* at 27:8–21.

8 Google limits access to these decryption keys to select individuals, and if any unauthorized  
 9 individual seeks access to them, Google has systems in place that will prevent them from obtaining  
 10 access. *See Interrog. Set One Resp.*, ECF No. 364-1, at 27:15–28:2 (Appx. A-13); *see also* Black  
 11 Rpt., ECF No. 364-20, at ¶¶ 171, 178 (Appx. A-21). Google also “salts” data in GAIA logs, meaning  
 12 random data is added to it, to make it even harder to match it up to overlapping data sets in  
 13 pseudonymous logs. ECF No. 364-1, at 26:7–9 (Appx. A-13).

15 Finally and most importantly, Google employees are flatly forbidden from performing a  
 16 “join” of data that would unmask the identity of an individual whose data was logged in  
 17 pseudonymous space. *Id.* at 24:9–15, 27:22–28:2.<sup>19</sup> Many of these controls have been in place  
 18 since Google launched ~~GA for Firebase~~GA4F; others have been adopted over time. Google’s  
 19 prohibition on circumventing these privacy controls, however, have been in place at least since ~~GA~~  
 20 ~~for Firebase~~GA4F launched. *See App’x X4 to Black Rpt.* (compiling “Anti-Fingerprinting” Policies  
 21 as far back as January 21, 2015) (Appx. A-16).

#### 22 IV. UNDISPUTED MATERIAL FACTS

23 In light of the foregoing statement of facts, and for the ease and convenience of the Court,  
 24 Google submits that the following undisputed material facts resolve this dispute in its entirety,  
 25 understanding the Court may also find other undisputed facts described above material as well.

27 <sup>19</sup> *See also App’x X4 to Black Rpt.*, ECF No. 364-4 (Appx A-16) (compiling Google’s “Anti-Fingerprinting”  
 28 Policies); “GEO Privacy Champion”<sup>20</sup>, ECF No. 361-13, at - 411 (Appx. A-10); ECF No. 314-7, (Unsealed  
 Version, Appx B at B-2); Ganem Tr., at 44:1-44:19, (Appx. A-15); Hochman Tr., ECF No. 364-19, at  
 135:25–136:1 (Appx. A-20) (“Yeah, I don’t think I necessarily found an indication of joining.”).

1        1. At all relevant times, Google represented that the WAA button controlled  
 2              whether certain data would be “saved to your Google Account.”  
 3

4        2. At all relevant times, the phrase “saved to your Google Account” limited the  
 5              ambit of the WAA button to permissions relating to saving data in a manner that was  
 6              associated with personal information.  
 7

8        3. At all relevant times, Google represented through its Privacy Policy and  
 9              Privacy Portal that the phrase “saved to your Google Account” meant “associated with your  
 10             personal information,” not “saved” in any form, for any purpose, even if made  
 11             pseudonymous.  
 12

13        4. At all relevant times, Google’s Privacy Policy defined “personal information”  
 14              to mean information “which personally identifies you, such as your name, email address or  
 15              billing information, or other data which can be reasonably linked to such information by  
 16              Google, such as information we associate with your Google account,” or a substantially  
 17              similar definition.  
 18

19        5. Google did not save the WAA-off or (s)WAA-off data at issue in this case  
 20              generated by class members to that class member’s Google Account.  
 21

22        6. Google did not associate the WAA-off or (s)WAA-off data at issue in this case  
 23              generated by class members with the class members’ personal information.  
 24

25        7. Google maintained the WAA-off or (s)WAA-off data at issue in this case  
 26              generated by class members in pseudonymous or anonymous form in a manner that disabled  
 27              Google employees from personally identifying the user that generated the data.  
 28

29        8. Google never used the WAA-off or (s)WAA-off data at issue in this case  
 30              generated by class members to personalize advertising to class members or build marketing  
 31              profiles.  
 32

## V. ARGUMENT

33        Plaintiffs’ case hinges on the factual claim that Google saved app activity data gathered by  
 34              ~~GA for Firebase~~<sup>GA4F</sup> to Plaintiffs’ Google Accounts while (s)WAA was switched off. Because  
 35              Google represented that it would save such data to a user’s Google Account only when they had  
 36              turned WAA on, Plaintiffs argue, Google violated its promises to users and thereby their privacy  
 37              rights. That same theory underlies the Court’s decision to permit some of Plaintiffs’ claims to  
 38              proceed past the pleadings stage. ECF No. 109, at 3–4, 6. Per the Court, “[u]nder this theory of  
 39              liability, ~~GA for Firebase~~<sup>GA4F</sup>—when running as marketed—allows Google to collect information  
 40              about an individual’s ‘activity on . . . apps . . . that use Google services,’ notwithstanding the WAA  
 41              Materials’ statement that ‘[t]o let Google save this information . . . Web & App Activity must be  
 42              on.’” <sup>2</sup> *Id.* at 6. (original emphasis and alterations).  
 43

1 And the same theory is what ultimately was certified by the Court for a class trial. ECF No.  
 2 352. In particular, the Court accepted Plaintiffs' argument that the only questions necessary to  
 3 decide this case are (1) what Google represented, (2) what Google's uniform conduct was, and (3)  
 4 whether any variance between them rises to the level of liability. *E.g.*, *id.* at 11.

5 The answers to these three questions are straightforward. (1) Google represented that the  
 6 WAA button would control whether Google had permission to save activity data to the user's  
 7 Google Account. (2) Google does not save activity data to the user's Google Account when (s)WAA  
 8 is off. And (3) Google's practice of keeping basic, pseudonymous records of its advertising does  
 9 not deviate from its representations concerning (s)WAA. Therefore, there is no liability under the  
 10 CDAFA or Plaintiffs' invasion of privacy claims.

11 **A. Plaintiffs consented.**

12 Consent is an absolute defense to each of Plaintiffs' remaining claims: CDAFA, invasion of  
 13 privacy, and constitutional invasion of privacy. Because no reasonable juror could find that  
 14 Plaintiffs reasonably believed (s)WAA did what they claim, Google's consent defense alone  
 15 requires a full dismissal of Plaintiffs' claims.

16 In granting class certification, this Court accepted Plaintiffs' argument that "express consent  
 17 does not defeat predominance because the "'sWAA disclosures and Google's Privacy Policy' are  
 18 the only relevant materials for analysis, and are 'the same for all class members.'" ECF No. 352<sub>2</sub> at  
 19 15 (quoting Plaintiffs' Class Cert. Reply, at 10). The Court held that Google's consent defense could  
 20 be decided class-wide because "Google's representations about the WAA feature, unambiguous and  
 21 persistent by its own admission, outweigh these individual questions about where class members  
 22 learned about the WAA feature."<sup>20</sup> *Id.* at 15–16.

23 Now is the time to make that determination. Plaintiffs by their own argument invited an  
 24 evaluation of these two sets of uniform representations. If these representations are unambiguous,

---

25  
 26 <sup>20</sup> Google also argued that class members consented in various ways to Google's conduct by consenting to  
 27 third party apps' privacy policies. This Court ruled that such consent was not relevant to Google's liability,  
 28 which could be determined class-wide, because "the relevant question concerns Google's disclosures about  
 the sWAA button, not third-party disclosures to users," and "[t]o the extent Google had a policy that required  
 third party apps to disclose Google's policies to users, that evidence may be applied across the class." ECF  
 No. 352<sub>2</sub> at 17. As such, these third party disclosures cannot now create a material issue of disputed fact.

1 or are not susceptible to Plaintiffs' reading of them, their case must end.

2 The representations are unambiguous. As discussed above, the description of (s)WAA was  
 3 plain and straightforward: the button controls whether Google has permission to "save" "web & app  
 4 activity data" to a user's "Google Account."<sup>21</sup> Google does not "save" "app activity data" sent to it  
 5 via ~~GA for Firebase~~<sup>GA4F</sup> or the Google Ads products in question, or any product or service  
 6 addressed by Plaintiffs, to a user's "Google Account." *See* Interrog. Set One Resp., ECF No. 364-  
 7 1, at 23:27–24:7 (Appx. A-13). Instead, Google's uniform policy and practice is to take significant  
 8 steps to separate (s)WAA off data from any personally identifiable information belonging to the end  
 9 user who generated the data. *See id.* at 24:5–28:2, & App'x X4 to Black Rpt., (Appx. A-16).

10 To the extent any user was confused by the plain meaning of the (s)WAA representations,  
 11 they were also uniformly presented with Google's Privacy Policy and Privacy Portal, which  
 12 repeated the distinction between data saved to a "Google Account" and data that is not "associated  
 13 with personal information" in numerous places. *See supra* III.B. (discussing historic representations  
 14 made in Google's Privacy Policies, ECF No. 323-1 (Appx. A-7)).

15 There is no ambiguity to be exploited here. For four years, Plaintiffs have repeated their  
 16 constant refrain that "off" means "off"; that (s)WAA was a light switch, and that whatever (s)WAA  
 17 meant, turning it off should do the opposite of what turning it on does. There is no dispute that this  
 18 is exactly how the button works, but Plaintiffs press the theory that the (s)WAA button should stop  
 19 *all* data flow to Google from any Google product or service if Google knows the end user has  
 20 (s)WAA off — every bit and byte. But that is not what the (s)WAA button representations say. For  
 21 Plaintiffs to prevail on any of their claims, a reasonable juror would have to conclude that the phrase  
 22 "to your Google Account" in the (s)WAA description was surplusage, otherwise that limitation must  
 23 mean *something*, and so it cannot be that the button should stop *all* data flow. Because no reasonable  
 24 juror can so conclude, Plaintiffs cannot prevail. As a matter of law, they consented.

25 Finally, Plaintiffs' Motion for Class Certification grossly misused internal e-mails and user  
 26 studies to suggest that the record-keeping that is now the focus of their case was considered  
 27

---

28 <sup>21</sup> There is also a use limitation in how (s)WAA is described: that the permission is for using the data to  
 "personalize experiences" across Google. Compl., ECF No. 1, at ¶ 49.

1 internally at Google and concluded by certain employees to violate the promise of WAA. None of  
 2 those documents supported Plaintiffs' position, because there is *no* evidence that any Google  
 3 employee ever believed that the WAA button would somehow disable all advertising by stopping  
 4 the flow of all data between a mobile app seeking to serve an ad and Google, or disable the logging  
 5 of basic ad events like conversions. Indeed, each employee and former employee asked about this  
 6 in deposition denied that they ever shared Plaintiffs' extreme reading of WAA, even as they  
 7 internally expressed unrelated concerns about WAA that are not a basis for this case.

8           **B. Plaintiffs cannot maintain their privacy torts for independent reasons.**

9           From the start, this case was manufactured around a creative, lawyerly, *unreasonable*  
 10 reading of the (s)WAA description coupled with the incorrect allegation that Google was collecting  
 11 personally identifiable (s)WAA-off activity data. It wasn't, it doesn't, and the pseudonymous data  
 12 it *does* collect is collected lawfully. As a result, the fundamental premise of Plaintiffs' privacy  
 13 claims, that Google intentionally violated a reasonable expectation of privacy in a highly offensive  
 14 manner causing harm, has no factual basis. *See Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200,  
 15 232 (1998) (reciting elements).

16           **No expectation of privacy.** There is no dispute: (s)WAA-off data is not saved to a user's  
 17 Google Account, and is not associated with any individual user's identity. Instead (s)WAA-off data  
 18 is logged with random number identifiers that cannot be joined with any person. Courts in this  
 19 district do not recognize a privacy interest in non-personal information. For example, there is no  
 20 "protected privacy interest" in a randomly generated "numeric code" that cannot be associated with  
 21 a user's identity. *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1025 (N.D. Cal. 2012). And courts  
 22 have already held that if "app activity data [is] not tied to any personally identifiable information,  
 23 [is] anonymized, and [is] aggregated," that does not rise to the level of invasion of privacy or  
 24 intrusion upon seclusion "in this district." *McCoy v. Alphabet, Inc.*, No. 20-CV-05427-SVK, 2021  
 25 WL 405816, at \*8 (N.D. Cal. Feb. 2, 2021). Most recently, a Ninth Circuit panel concluded that  
 26 Google's clear disclosure in its Privacy Policy that it may receive user activity data across "third-  
 27 party sites and apps that use Google services," including from the "Android operating system,"  
 28 means users cannot have a reasonable expectation of privacy in their app activity data on Android

1 devices vis-~~a~~-vis Google, as these apps utilize the Android OS. *Hammerling v. Google, LLC*, No.  
 2 22-17024, (9th Cir. Mar. 5, 2024) (~~Unpublished~~unpublished).

3 This outcome makes sense. Nobody who uses mobile apps reasonably believes that they can  
 4 grind the mobile ads ecosystem to a halt by flipping a single button (or any other way). Even when  
 5 personalization of advertising is disabled, advertising can still be served in spaces where apps  
 6 choose to sell advertising space. And the server of those apps will of course keep a log that the ad  
 7 was served. Under Plaintiffs' theory, ads served in a mobile app that were selected *at random*  
 8 violated their privacy because they expected the ~~(s)~~WAA button to disable the entire data flow from  
 9 the app to Google, no matter how anonymous. That theory cannot square with any reasonable  
 10 definition of expectation of privacy.

11 Nor does the ~~(s)~~WAA toggle set an expectation of privacy in pseudonymous data. The  
 12 disclosures Google made in its ~~(s)~~WAA description and its Privacy Policy unambiguously and  
 13 uniformly explain that ~~(s)~~WAA controls whether activity data is saved to a user's Google Account,  
 14 *i.e.*, associated with their identity. Wherever these concepts are discussed in the Privacy Policy,  
 15 Google's distinction between "your Google Account" and "non-personal information" is clear and  
 16 unambiguous, and the Privacy Policy also makes clear that privacy controls, including ~~(s)~~WAA, can  
 17 toggle whether Google collects personal information, but that it will continue to keep basic records  
 18 with non-personal information and report that basic record information to advertisers. *See* Privacy  
 19 Policies, ECF 323-1, at ~~4-9, 11, 15-17, 23, 52, 54-55, 57 (Appx. A-7)).~~ Nor can there be a  
 20 triable issue here based solely on Plaintiffs' confusion despite these unambiguous disclosures, as  
 21 that would fatally undermine their class certification theory, which presumes that the class was  
 22 uniformly exposed to these disclosures and asks the factfinder to determine class-wide whether the  
 23 class was reasonably confused.

24 **Not highly offensive.** Data sent to Google by apps using ~~GA for Firebase~~GA4F is handled  
 25 consistently with Google's description of ~~(s)~~WAA. There is no dispute that Plaintiffs were subject  
 26 to Google's disclosures, and accepted Google's terms of service. Google disclosed the collection of  
 27 pseudonymous data notwithstanding ~~(s)~~WAA. No reasonable person would find disclosed and  
 28 agreed-upon conduct highly offensive.

1 Per Google's disclosures, a user's app activity data collected via ~~GA for Firebase~~<sup>GA4F</sup> is  
 2 never saved to their Google Account (or associated with their personal identity in any other way for  
 3 that matter) if (s)WAA is off. Nor could the collection of such data be considered "an egregious  
 4 breach of social norms" or "intrusion [] in a manner highly offensive to a reasonable person." See  
 5 *also Williams v DDR Media, LLC*, No. 22-cv-03789-SI, 2023 WL 5352896 at \*5-6 (N.D. Cal. Aug.  
 6 18, 2023); *City & Cnty. of San Francisco v. Purdue Pharma L.P.*, No. 18-CV-07591-CRB, 2021  
 7 WL 842574, at \*2 (N.D. Cal. Mar. 5, 2021) (holding no privacy concerns in de-identified  
 8 information in discovery dispute); *London v. New Albertson's, Inc.*, No. 08-CV-1173 H(CAB), 2008  
 9 WL 4492642, at \*8 (S.D. Cal. Sept. 30, 2008) (same). Thus, "there is no plausible allegation that  
 10 [Google] tracked Plaintiff's location as opposed to some anonymous clientid that is not matched to  
 11 any particular person."<sup>22</sup> *Moreno v. San Francisco Bay Area Rapid Transit Dist.*, No. 17-CV-02911-JSC, 2017 WL 6387764, at \*4 (N.D. Cal. Dec. 14, 2017) (emphasis in original).

13 This makes good sense. Google has taken significant steps to bar the very practice that  
 14 Plaintiffs allege occurred here—the *personal* tracking of a user despite their decision to turn  
 15 (s)WAA off. Even if it was reasonable for users to review the WAA disclosure and related  
 16 disclosures and conclude that turning off (s)WAA would prevent Google from retaining any record  
 17 that it served an ad to a device identifier that is never associated with the user's identity, no  
 18 reasonable juror could conclude on these facts that Google's retaining such a record is highly  
 19 offensive, because the record does not identify anything about anyone—a far cry from anything  
 20 approaching actionable invasion of privacy.

21 **No intent.** To the extent a reasonable juror could conclude that there is any daylight between  
 22 the description of (s)WAA and the Privacy Policy on one hand and Google's uniform conduct on  
 23 the other hand, no reasonable juror could conclude that Google **intentionally** invaded the privacy  
 24 of or intruded upon the seclusion of class members. To the contrary, Google took substantial steps—  
 25 far beyond the steps it was obligated to take—to prevent bad actors and its own employees from  
 26 invading class members' privacy. Google contractually forbade app developers from sending it

28 <sup>22</sup> Nor is it sufficient to "postulate that [] third parties could, through inferences, de-anonymize this data" if  
 it is "not clear that anyone has actually done so." *Low*, 900 F. Supp. 2d at 1025.

1 personally identifiable information, it instituted technologically sophisticated safeguards to  
 2 maintain users' identity separate from the app activity data it stored for app developers, and it  
 3 disabled itself from using the data for any purpose other than those disclosed to users in the Privacy  
 4 Policy—basic record-keeping about its advertising business (and *not* any ads personalization or  
 5 building of marketing profiles). Even if a reasonable juror could find that Google's description of  
 6 the (s)WAA button deviated in some way from Google's uniform conduct, no reasonable juror could  
 7 conclude that this variance was done with the intent required to commit the intentional tort of  
 8 invasion of privacy. *See Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056 (N.D. Cal. 2016)  
 9 (finding that intrusion upon seclusion or intentional infliction of emotional distress claims require  
 10 intent on the part of the tortfeasor); *see also In re Accellion, Inc. Data Breach Litig.*, No. 5:21-CV-  
 11 01155-EJD, 2024 WL 333893, at \*16 (N.D. Cal. Jan. 29, 2024) (dismissing plaintiffs' intrusion  
 12 upon seclusion claim where complaint failed to allege that defendant "intentionally intruded" or that  
 13 the intrusion was highly offensive). As a matter of law, the undisputed facts cannot make out the  
 14 intent element of the privacy torts.

15 Because Plaintiffs cannot establish any of the elements of their privacy claims, summary  
 16 judgment should be granted in Google's favor on those claims.

17 **C. Plaintiffs cannot establish harm for any of their claims.**

18 Harm is a necessary element of the intentional torts and Plaintiffs' CDAFA claim, and  
 19 Plaintiffs cannot show any harm to the class as a result of Google's conduct. *See Perkins v. LinkedIn*  
 20 *Corp.*, 53 F. Supp. 3d 1190, 1219 (N.D. Cal. 2014) (dismissing plaintiffs' CDAFA claims on the  
 21 basis that Plaintiffs did not adequately allege that they had suffered any "tangible harm from the  
 22 alleged Section 502 violations."); *Hammerling v. Google LLC*, 615 F. Supp. 3d 1069, 1090 (N.D.  
 23 Cal. 2022) ("Determining whether a defendant's actions were 'highly offensive to a reasonable  
 24 person' requires a 'holistic consideration of factors such as the ***likelihood of serious harm*** to the  
 25 victim, the degree and setting of the intrusion, the intruder's motives and objectives, and  
 26 whether countervailing interests or social norms render the intrusion inoffensive.'") (quoting  
 27 *Facebook Tracking*, 956 F.3d at 606 (quoting *Hernandez v. Hillsides, Inc.*, 211 P.3d at 1063, 1073  
 28 (2009)) (emphasis added).

1 Google opposed class certification in part on the basis of individualized harm inquiries. The  
 2 Court rejected that argument and accepted that Plaintiffs could demonstrate class-wide harm,  
 3 reasoning that “even if Google is right, and the ‘vast majority’ of class members’ data was only  
 4 exposed to record-keeping ‘not tied to a person’s identity or used by Google for any purpose other  
 5 than to perform accounting for the apps that generated the data or advertising in the first place,’  
 6 Opp.<sup>16</sup> at 16, then surely that can be proven by common evidence of Google’s record-keeping  
 7 practices.” ECF No. 352<sub>2</sub> at 12. Plaintiffs’ certified class thus must proceed on a theory that the  
 8 money Google made by keeping receipts for the advertising it sold is the appropriate measure of  
 9 class-wide damages, regardless of whether keeping receipts harmed any individual class member.

10 The problem with this theory is that Google’s conduct cannot be said to have harmed any  
 11 class member in particular or the class at large, because its conduct did not exploit any class  
 12 member’s privacy, did not intrude upon their private space, or take from them something they  
 13 intended to keep for themselves or sell to another, *i.e.*, pseudonymous data about their use of  
 14 Firebase-enabled apps. No court has ever found that such basic record-keeping is harmful to anyone.

15 To fix this problem, Plaintiffs have previously relied on an entitlement to disgorgement of  
 16 profits to allege harm under their tort and CDAFA claims, based on a single sentence in the Ninth  
 17 Circuit’s decision in *Facebook Internet Tracking*, 956 F.3d 589. But, as Judge Chhabria has pointed  
 18 out, the court’s analysis on this was solely focused on Article III standing, not the damage or harm  
 19 required to establish liability under Plaintiffs’ tort and CDAFA claims. See *McClung*, 2024 WL  
 20 189006<sub>2</sub> at \*2. (“The Court continues to be skeptical of the plaintiffs’plaintiffs’ theory that  
 21 California’sCalifornia’s statutory standing requirement for these claims can be satisfied simply by  
 22 alleging that the defendant was unjustly enriched by the misappropriation of personal  
 23 information.”). Further, “the Article III analysis in that section of *Facebook Internet Tracking* has  
 24 been superseded by *TransUnion*, making it even more of a stretch to rely on that section as an  
 25 implicit statement about statutory standing under California law. *Id.* at n.2 (citing *TransUnion*, 594  
 26 U.S. at 426–30).

27 Finally, to the extent Plaintiffs seek to rely on the subjective experiences of the Named  
 28 Plaintiffs, that would belie the theory of damages Plaintiffs pushed in order to certify the class. They

1 cannot now backtrack and argue that the idiosyncratic emotional experiences of 100 million class  
 2 members can be proven class-wide; obviously they cannot be. In other words, Plaintiffs argued  
 3 themselves into a corner: they cannot tell this Court that they need not prove actual damages in order  
 4 to certify a class, only to argue now in opposition to summary judgment that they can prove actual  
 5 class-wide harm using common proof. The two are irreconcilable.

6 **D. Plaintiffs' analysis of the CDAFA claim's "without permission" requirement  
 7 focuses on the wrong permission-giver.**

8 Plaintiffs' CDAFA claim fails for the reasons discussed above. But the CDAFA claim fails  
 9 for the additional reason that Plaintiffs cannot establish that Google acted "without permission,"  
 10 even if app developers' end users failed to consent to their use of ~~GA for Firebase~~GA4F by virtue  
 11 of their (s)WAA settings, because the most correct lens to view this claim through is one that focuses  
 12 on Google's permission vis-à-vis the app developers, not the end users.

13 Google never exceeded the scope of its permission to use the data gathered by app  
 14 developers and sent to Google via ~~GA for Firebase~~GA4F because it is undisputed that (1) Google  
 15 required app developers to obtain consent from end users for their use of ~~GA for Firebase~~GA4F  
 16 (*See* Google's Resp. to Plaintiffs' Interrog., Set Six, ECF No. 364-22, at 10:25–11:18 (Appx. A–  
 17 22)) and (2) Plaintiffs do *not* allege an invasion of their privacy solely by virtue of Google's function  
 18 as *data processor* for app developers as their agent. Nor could they: Courts in this district have  
 19 already held that when a tech company acts as a vendor for another, its scope of consent is  
 20 coterminous with the party to the communication. *See Graham v. Noom, Inc.*, 533 F. Supp. 3d 823,  
 21 833 (N.D. Cal. 2021); *Williams v. What If Holdings, LLC*, No. C. 22-03780 WHA, 2022 WL  
 22 17869275, at \*3 (N.D. Cal. Dec. 22, 2022). *See*; *see also* *Byars v. Hot Topic, Inc.*, 656 F. Supp. 3d  
 23 1051, 1067–68 (C.D. Cal. 2023); *Johnson v. Blue Nile, Inc.*, No. 20-cv-08183-LB, 2021 WL  
 24 1312771, at \*1 (N.D. Cal. Apr. 8, 2021); *Yale v. Clicktale, Inc.*, No. 20-cv-07575-LB, 2021 WL  
 25 1428400, at \*3 (N.D. Cal. Apr. 15, 2021).

26 Here, none of Google's conduct falls outside the scope of its role as vendor for the app  
 27 developers. Google does not make copies of the (s)WAA-off data for itself to, e.g., enhance its  
 28 marketing profiles or better personalize advertising. It does not sell or exploit the data. It processes

1 the data sent to it under contracts with third party entities who collected it. And those contracts  
2 permit Google to use the data for various uses. Plaintiffs have never alleged that Google exceeded  
3 that scope of permission, so no CDAFA claim could lie.

4 **VI. CONCLUSION**

5 For the foregoing reasons, the Court should dismiss this case with prejudice.

6  
7  
8  
9  
10 Dated: April 4~~March 28~~, 2024

Respectfully submitted,

11 WILLKIE FARR & GALLAGHER LLP

12 By: /s/ Eduardo E. Santacana

13 Benedict Y. Hur

14 Simona Agnolucci

Eduardo E. Santacana

Argemira Flórez

Harris Mateen

17 *Attorneys for Defendant*  
18 *Google LLC*